

THE HIGH COURT

[2024] IEHC 414

Record No. 2021/640SS

**In the matter of a case stated pursuant to Section 949AQ Taxes Consolidation Act
1997**

Between

MATTHEW BUCKLEY

Appellant

and

THE REVENUE COMMISSIONERS

Respondent

Judgment of Mr. Justice Conor Dignam delivered on the 4th day of July 2024

Introduction

1. This is a case stated by a Tax Appeals Commissioner pursuant to section 949AP and 949AQ of the Taxes Consolidation Act 1997, as amended, for the opinion of this Court in relation to a determination by the Tax Appeals Commissioner dated the 23rd February 2021 on a tax appeal by the appellant.

2. Briefly, it arises as follows. The appellant purchased lands in 2005. His stated intention was to develop the site. He did not in fact do so due, he says, to the downturn in the economy. He has not yet developed the site and has not sought or obtained rezoning or planning permission to do so. He claimed losses (the cost of borrowing to purchase the site) in respect of the project against other income for the first time in respect of the tax year of assessment 2008. He claimed losses against income each year after that. He did so on the basis that he was engaging in trade as a land developer. Following an audit, Revenue informed him that they were withdrawing the loss relief claimed for the tax years of assessment 2008 to 2015. They did so on the basis that documentation and information supplied by the appellant did not "*provide evidence of trade*". The appellant appealed this decision to the Tax Appeals

Commission. In addition, the appellant appealed to the Commission that even if the activity was not a trade (i.e., the losses were not allowable) he had at all times made full and true disclosure of all material facts necessary for the making of an assessment for each chargeable period and that as a result of section 955(2) of the Taxes Consolidation Act 1997 ("the 1997 Act") no additional tax shall be payable after the end of four years commencing at the end of the chargeable period in which the return was delivered, i.e. no additional tax shall be payable for the years of assessment 2008-2011.

3. Thus, the issues between the parties on the appeal were whether the appellant was engaging in a trade (which is defined in section 3 of the 1997 Act as including "every trade, manufacture, adventure or concern in the nature of trade") and whether, if not, he had made full and true disclosure for the years 2008-2011. A central authority in relation to the first of these issues is *Revenue Commissioners v O'Farrell [2018] IEHC 171*.

4. The Commissioner held against the appellant on both issues. The appellant served a Notice of Appeal in accordance with section 949AP of the 1997 Act and the Commissioner stated this case seeking the opinion of this Court on the following questions:

I. Whether, upon the facts proved or admitted, the evidence adduced, and upon my interpretation and analysis of the High Court authority of *Revenue Commissioners v O'Farrell [2018] IEHC 171*, I was correct in law in my determination that the Appellant was not conducting a trade of land development during the tax years of assessment 2005 to 2015.

II. Whether I was correct in law to determine that the Appellant's returns for the tax years of assessment 2008-2011, did not contain a full and true disclosure of the facts in accordance with section 955(2)(b)(i) TCA 1997 and whether I was correct in law in my determination that the four year rule per section 955(2)(a) was dis-applied and that the assessments raised for the tax years of assessment 2008-2011 were within time pursuant to section 955(2)(b)(i) TCA 1997."

Legal Principles Applicable to Case Stated From the Commission

5. The applicable principles are very well-established since at least *Mara v Hummingbird [1982] ILRM 421* and *Ó Culacháin v McMullan Brothers Limited [1995] 2 IR 217* and there was, in fact, no serious dispute between the parties in relation to the principles to be applied. Counsel for the Revenue Commissioners outlined the overall approach. The Court must proceed on the basis that the relevant facts are those found by the Commissioner as set out in the case stated. These findings of primary fact must be accepted unless there is no evidence whatever to support them. The Court is free to resolve any legal issues. Conclusions or inferences from primary facts are mixed questions of fact and law. If such conclusions or inferences are based on an incorrect view of the law then the Court should intervene but otherwise such conclusions

or inferences should not be set aside unless they are such that no reasonable Commissioner could have drawn them. A useful summary of these applicable principles is contained in Ó *Culacháin*:

- “(1) Findings of primary fact by the judge should not be disturbed unless there is no evidence to support them.
- (2) Inferences from primary facts are mixed questions of fact and law.
- (3) If the judge’s conclusions show that he has adopted a wrong view of the law, they should be set aside.
- (4) If his 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 judge could draw.
- (5) 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 we are not retrying the case) 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.”

6. This general approach is also reflected in the English authorities, including, for example *Marson v Morton* [1986] STC 463 and *Eclipse Film Partners (No 35) LLP v HMRC* [2015] STC 1429, to which I was referred by the Revenue.

7. The approach to the specific issue of whether or not an activity is a ‘trade’ was considered in the second of those cases, where Sir Terence Etherton J stated:

“[112] ... its meaning [of “trade”] in tax legislation is a matter of law. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the evaluation of the activity by the tribunal of fact. These propositions can be broken down into the following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trade activity. It is a matter of law whether a particular activity is capable of constituting a trade. Whether or not the particular activity in question constitutes a trade depends upon an evaluation of the facts relating to it against the background of the applicable legal principles. To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal.

[113] It follows that the conclusions of the tribunal of fact as to whether the activity is or is not a trade can only be successfully challenged as a matter of law if the tribunal made an error of principle or if the only reasonable conclusion on the primary facts found is inconsistent with the tribunal’s conclusion. These propositions are well established in the case law...”

8. Similarly, in relation to the approach to be adopted to the question of whether a party is engaging in trade, in *Cooper v C & J Clark Ltd [1982] STC 335* at 341 Nourse J said "...whether or not a given state of affairs does or does not amount to a trade is one of fact and degree" and in *Ransom v Higgs [1974] STC 539* Lord Wilberforce said, inter alia, at page 554;

"Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organisation, even of intention, and in such cases it is for the fact finding body to decide on the evidence whether a line is passed."

9. That approach of evaluating the facts relating to the activity against the background of the applicable legal principles is how the courts in this jurisdiction have approached the question of whether a particular activity is a "trade" even if that was not expressed as the approach (see *Spa Estates v Ó hArgáin (Kenny J, High Court, 20th June 1975)*, *Mara v Hummingbird [1982] ILRM 421*, and *The Revenue Commissioners v O'Farrell [2018] IEHC 171*). For example in *Mara v Hummingbird* Kenny J said:

"The ways of conducting business have become very complex and the answer to the question whether a transaction was an adventure in the nature of trade nearly always depends on the importance which the Judge or Commissioner attaches to some facts. He will have evidence some of which supports the conclusion that the transaction was an adventure in the nature of trade and he will have some which points to the opposite conclusion. These are essentially matters of degree and his conclusions should not be disturbed (even if the court does not agree with them, for we are not retrying the case) unless they are such that a reasonable Commissioner could not draw them or they are based on a mistaken view of the law."

10. The appellant places particular emphasis on the *Revenue Commissioners v O'Farrell* case and, indeed, submits that it effectively provides the answer to the question of whether the appellant in this case was engaged in trade in the relevant years and I will return to it in detail.

11. The burden of proof in a tax appeal to the Commissioner is on the tax payer (*Menolly Homes Ltd v Appeal Commissioners [2010] ITR 75*).

12. The Revenue also submitted that "curial deference" should be afforded to the Commissioner. However, no authorities were opened to me to support this submission.

Facts

13. There is in fact little or no dispute between the parties in respect of the primary facts and, indeed, the appellant has taken no issue with the facts which the Commissioner describes as "*proved or admitted*". The Commissioner sets out the facts in paragraph 7 of the Case Stated (which consists of a number of bullet points). I have considered the entirety of the Case Stated including all of paragraph 7. It is not necessary for me to recite it in full.

14. The appellant is a dentist by profession. He lived abroad for many years and returned to practice in Ireland in 1999, setting up a practice in Kildare.

15. In 2005, he purchased a 4.5 acre site near Ballymore Eustace, Co. Kildare at a cost of €330,000. His position was and is that he purchased the site with a view to building and developing houses on the land for resale. The land was zoned for agricultural use at the time of purchase. While the Commissioner did not make any findings in respect of the appellant's plans or intentions (I return to this), she records in her Determination that he gave evidence that the development would comprise three to five houses and that he engaged Huf Haus GmbH to build houses on the land. He gave evidence that he estimated that the first house would cost approximately €800,000 to build and that he hoped to sell it for approximately €1.5 million. He stated that if the first property sold as planned, there would be less borrowing for the second property and no borrowing for subsequent houses. The Commissioner also records that he stated that he did not plan to move into the houses himself as he could not afford to and had no plans to farm or live on the land. He also gave evidence (though no finding is made in respect of this) that there were no sewage facilities or water mains on site and that he had sunk a small well.

16. The cost of the purchase of the site was funded by a loan advanced to the appellant by AIB on the 3rd March 2005. It was advanced at a rate of 4.706% and was interest only in nature. The terms and conditions of the loan provided for full capital repayment of the loan within five years. The loan documentation did not expressly characterise the loan as either commercial or residential but described the purpose of the loan as 'property related'. The collateral for the loan was the site in respect of which the loan was advanced. It is not stated as a fact proven or admitted, but the Commissioner records in her Determination that evidence was given by the appellant that while the loan covered the purchase price only, there was a verbal understanding that when he started building the bank would finance construction.

17. The appellant incurred professional fees as follows: Stg£4,700 to Design Venture Limited on the 28th June 2005 for house design and planning application; and €17,025 on the 13th January 2006 to Huf Haus GmbH (described as a deposit on the invoice and explained by

the appellant as an advance). The Commissioner records that evidence was given by the appellant that he also engaged a local planning agent and the appellant paid him €3000.

18. In 2007, in light of the downturn in the economy, the appellant made the decision to put the development on hold until market conditions improved. No application for planning permission has been formally submitted to the local authority since the land was purchased and therefore no planning permission has been obtained. The land remains zoned for agricultural use.

19. After he decided to put the development on hold, the appellant continued to pay interest on the loan. It was negotiated and extended in June 2010. The appellant claimed the interest payable on the loan as an expense of the trade of land development. As the project did not generate any income, this amounted to a loss. He deducted those losses from his other income pursuant to section 381 of the 1997 Act.

20. He did not register for VAT in respect of the trade. He did not claim losses in his 2005, 2006 or 2007 tax returns and claimed such losses for the first time in respect of the tax year of assessment 2008, i.e. after placing the development project on hold in 2007. His explanation (given by his agent on 28th January 2015) for not registering for VAT and for not claiming the losses was that his dental practice was significantly profitable at the time and the trade in land development was an ancillary trade that did not require much time or input. In correspondence after the hearing before the Commissioner, it was explained that the appellant had forgotten to make his new tax agent aware that payments and trading losses relating to the site were applicable in 2005, 2006 and 2007.

21. The losses for those years were included by the appellant in his return for 2009. His return for that year showed an overpayment of tax for that year of €14,873.29.

22. That was noted by Revenue in correspondence dated the 13th January 2011 and trading accounts for the site development were requested by way of verification. They were provided by the appellant. There was no further correspondence from Revenue at that time and a repayment in that amount was subsequently processed and issued to the appellant in 2011. The appellant's position before the Commissioner was that on the basis of these interactions and the repayment the Revenue had accepted that the appellant was entitled to claim losses arising from his trade of land development. This was not advanced (either before the Commissioner or the Court) as determining the question of whether the appellant was engaged in trade or to suggest that the Revenue were estopped from determining that he was not engaged in trade. In her Determination the Commissioner had regard to it in relation to the question of whether he had made proper returns.

23. The appellant's tax affairs were audited in 2013. This gave rise to some queries, including why there were no claims for losses in 2005, 2006 or 2007. The appellant replied by

letter of the 27th January 2015 and his agent also replied by letter of the following day giving the explanation referred to above. The Commissioner quotes the two letters in full in her Case Stated (and in her Determination). It is not necessary to quote the agent's letter. It may be helpful to quote the letter from the appellant himself. He wrote:

"The original plan when I first purchased the four and a half acre site was to build a few large, good quality houses which would attract upmarket buyers re-locating out of Dublin. I was motivated by a very successful development in Eadestown, where eight houses had been built over a period of about two years. They were subsequently sold for one to two million each. After exploring the options, we eventually chose the German company, Huf Haus because of their innovative design, efficiency and reliability.

I obtained 100% initial financing from AIB (site + stamp duty). Once permission for one house was obtained, I would apply for further financing and have the house completed within six months and sold fairly quickly. Depending upon the interest in the first house, we would choose the design of the remaining houses (i.e. Bigger, smaller). If I managed to build and sell three houses, I could have expected a profit of €500,000 to €2,000,000. My dental practice was going well at the time so I could afford to carry the finance costs in the (expected) short term.

The intention initially was that Huf Haus would handle the planning application. However, it soon became evident that neither they, nor myself, having recently returned from twenty five years abroad, were qualified enough to deal with Kildare County Council planning authorities. We then engaged a local agent, J.J. Warren, who had been recommended to us by other developers. He undertook the task for an initial fee of €6,000. After two years, when he saw that no further funding was forthcoming, he announced planning could not be obtained until a large sewage treatment facility, then under construction in Ballymore Eustace, was completed.

The sewage works were eventually completed. However, by then, the financial climate had changed, the bank had ceased funding and the housing market had gone into a severe downturn.

During the time when Mr. Warren was seeking permission for the planned development, I was concentrating on my own job and also negotiating to buy out my partner and two other practices...I had financing arranged through BOSI. I only closed one deal because the dental landscape began to change noticeably in 2008 (prior to the general crash). In 2009 dentistry collapsed, incomes plummeted, getting progressively worse each year since.

The recent strength, in property values raises hope that I may yet succeed with the site development, possibly on a more modest scale."

24. On the 23rd June 2017, Revenue informed the appellant's agents of the intention to withdraw the loss relief allowed for the tax years of assessment 2008-2015 on the basis that "*Neither the documentation nor information supplied provide evidence of trade.*" On the 4th July

2017, the Revenue furnished the appellant with a schedule of revised calculations for all tax years from 2008 to 2015, disallowing losses of €168,120.

25. The appellant appealed to the Tax Appeals Commission. The core areas of dispute on that appeal were that the appellant submitted that for those years he was carrying on a trade or adventure in the nature of a trade as a land developer and in any event he had made a full and true disclosure of all material facts necessary for the making of an assessment for each chargeable period and the Revenue was therefore not permitted to raise assessments beyond the four year statutory limitation period contained in section 955(2)(a) and 959AA of the 1997 Act and the Revenue submitted that the appellant was not carrying on a trade for those years and the appellant's returns did not contain a full and true disclosure of all material facts.

26. The Commissioner issued her Determination on the 23rd February 2021. A notice of Appeal was delivered by the appellant on the 28th February 2021 pursuant to Section 949AP of the 1997 Act and the Commissioner sent this case stated for the opinion of this Court.

The Determination

27. In her Determination, the Commissioner noted that the appellant relied on an analysis of the "*badges of trade*" identified in 1954 by the Royal Commission on the Taxation of Profits and Income and that he placed considerable reliance on the High Court decision in *Revenue Commissioners v O'Farrell [2018] IEHC 171* to submit that land development is an adventure in the nature of trade and the adventure begins when the developer purchases the land for the purpose of development.

28. She considered and determined the question of whether the appellant was carrying on a trade or an adventure in the nature of a trade as a land developer at paragraphs 35-61 of her Determination. At paragraph 51, she identified the question which arose in the appeal as being "*...whether it can be said that the trade of land development begins when the developer purchases the land for the purposes of development if the land is at the time, zoned for agricultural use and if planning permission is neither obtained nor sought in relation to that land over a prolonged period.*" She then went on to consider the matter by reference to the evidence and to distinguish *O'Farrell* on a number of factual bases.

29. The Commissioner set out at some length the discussion in *O'Farrell* and noted at paragraph 60 of the Determination that "*the O'Farrell case is authority for the proposition that land development is an adventure in the nature of trade and that the adventure begins when the developer purchases the land for the purpose of development.*"

30. She said at paragraphs 60 and 61:

"60. The *O'Farrell* case is authority for the proposition that land development is an adventure in the nature of trade and that the adventure begins when the developer purchases the land for the purpose of development. However, in the absence of planning permission in circumstances where the land was zoned agricultural and required a change of use, it is clear that no development in this appeal could lawfully proceed at any point since the land was purchased in 2005. The facts of this appeal are not on all fours with *O'Farrell* because the absence of planning permission during the tax years of assessment 2008 to 2015, posed a fixed impediment to the commencement of construction and development on the land, in those years and beyond. As at the date of the hearing of the appeal in June 2019, a planning application had not yet been submitted and the prospect of future development on the land remained unchanged.

61. For the reasons set out above, I determine that the Appellant was not conducting a trade of land development during the tax years of assessment 2005 to 2015. In light of this determination, the Respondent's submission in relation to 82(3) TCA 1997, does not arise for consideration."

31. Thus, the Commissioner interpreted *O'Farrell* as meaning that the trade of land development begins when the taxpayer purchases the land for the purpose of development. However, she went on to distinguish *O'Farrell* and on that basis decided, on the facts of this case, that the trade did not begin at that point, i.e. that *O'Farrell* did not require her to determine (or indeed lead to the conclusion) that the trade commenced when the land was purchased.

32. In relation to the second issue, she determined that the appellant had not made a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period in his returns because he did not disclose that the project had been placed on hold in 2007 and in circumstances where the land was zoned for agricultural use and required a change of use for development and construction to proceed, no application was ever submitted to the local authority.

Submissions of the Parties

33. The appellant's primary submission is that it was determined in *Revenue Commissioners v O'Farrell*, in which Murphy J adopted the principles set out in *Mansell v Revenue and Customs Commissioners [2006] STC (SCD) 605*, that where a person purchases land with the intention

of developing it, the trade of land development commences when the person purchases the land.

34. It is submitted that while the Commissioner correctly stated the law, she misapplied it by *"taking into account irrelevant considerations, distinguishing the facts of the Appeal from O'Farrell on the basis of irrelevant/trivial differences and focusing on the facts of the O'Farrell decision, finding trivial points of difference while failing to apply the important principles from that decision and the very significant similarities in the fact pattern."* (paragraph 43 of the written submissions). It is submitted that the question that she posed for herself at paragraph 51 of her Determination was the wrong question, i.e., *"whether it can be said that the trade of land development begins when the developer purchases the land for the purposes of development if the land is at the time, zoned for agricultural use and if planning permission is neither obtained nor sought in relation to that land over a prolonged period."* The appellant submits that this question has no basis in the legislation or the *O'Farrell* decision because *O'Farrell* decided that the trade begins when the land is purchased.

35. The irrelevant considerations identified by the appellant are the fact that the lands were and are zoned agricultural and that no planning permission was sought or obtained. He says that there is no basis or authority for the Commissioner's view expressed at paragraph 53 of the Determination that no trade of land development is lawful or possible until planning permission is granted. He also submits that the Commissioner's view fails to take into account that the land was purchased as trading stock and could have been sold at a profit or a loss at any stage with or without planning permission or a change in zoning and with or without development and would have been a trading transaction, fails to take into account the inherently risky nature of development projects and that risks such as failure to get planning permission or substantial delays are part and parcel of the nature of the trade in developing land, and that it fails to take account of the fact that trade begins when the taxpayer starts operations which *"it is hoped will give rise to the expected profits"* (*Mansell*, paragraph 93) and not when profits are assured. It is also submitted that it was absurd to take account of the fact that planning permission was not obtained because if the appellant had subsequently obtained planning permission the trade would have commenced at the date of the purchase of the land giving retrospective effect to the *O'Farrell* decision.

36. He also addressed each of the points upon which the Commissioner distinguished the *O'Farrell* decision and submits either that the particular point is not a real point of distinction or that there is no evidential basis for the distinction or that the distinction was trivial and irrelevant.

37. In short, it is submitted that when the principles in *Mansell* (as adopted in *O'Farrell*) are applied the evidence establishes that the appellant was engaging in trade in the relevant years.

38. The appellant also referred to the “*badges of trade*” identified by the 1954 Royal Commission on the Taxation of Profits and Income and submits that when they are applied to the evidence it is clear that the appellant was engaged in trade from the time that he bought the land.

39. The appellant, in the submissions on his behalf, acknowledged that the courts have accepted that a change of mind as to the purposes of an acquisition may be recognised by the courts, but emphasised that “*a very clear intention*” would need to be formed in the mind of the trader. However, it was submitted that “*There was no change of mind involved (nor is there any evidence of same) as to the nature of the business and the economy simply developed to the Appellant’s detriment. However, the Appellant at all times intended to develop and sell on the property.*”

40. Finally, it is submitted that all material facts were returned to allow the Revenue to make an assessment in respect of the years 2008-2011 and that the Commissioner was wrong to conclude otherwise.

41. The Revenue’s overall submission is that when the correct approach to appeals by way of case stated from the Tax Appeals Commissioner is applied there is no proper basis upon which the Court could intervene with the Determination of the Commissioner. It was also submitted that the Commissioner was clearly correct in concluding that the appellant was not conducting a trade of land development during the years in question.

42. It is submitted that in assessing whether an individual is engaged in trade regard must be had to all the circumstances (see the quotes above from *Cooper v C & J Clark Ltd [1982] STC 335 at 341* that ultimately “*whether a given state of affairs does or does not amount to a trade is one of fact and degree*” and from Lord Wilberforce in *Ransom v Higgs [1974] STC 539*).

43. It is also submitted that the Commissioner correctly distinguished between this case and *O’Farrell* and that her identification of the issue at paragraph 51 of her Determination (quoted at paragraph 28 above was correct).

44. In short, it is submitted that the Commissioner was entitled and correct to have regard to the fact that the lands were zoned agricultural and that no planning permission was sought or obtained and that these are key points of distinction with *O’Farrell*.

45. Revenue referred to *Spa Estates v Ó hArgáin (Unreported, High Court, Kenny J, (20th June 1975)* in which it was held that an intending land developer who purchased proposed development lands but sold them before it commenced any development activities was not engaged in an ‘adventure’ in the nature of trade. Kenny J said at page 17 “*The purchase and sale of land might be an adventure in the nature of trade for a company which had commenced*

the business of building...But an isolated purchase of land by a company which had not commenced any trade or business and which did not buy the land with the intention of selling it as undeveloped land is not evidence from which it can be inferred that the purchase was an adventure in the nature of trade." At page 11 he said *"The purchase of the lands and the applications for planning permission seem to me to have been acts preparatory to the carrying on of a trade and not to be evidence that a trade was being carried on."*

46. The Court was also referred to the distinction drawn in the *Mansell* case between the set up of a trade and the commencement of the trade.

47. It was accepted that *"the badges of trade"* identified by the Royal Commission and updated list of factors in *Marson v Morton [1986] STC 463* can be useful in determining whether or not a particular activity amounts to a trade, though it was pointed out that they are not a comprehensive statement of all relevant matters and that no one test is determinative in any particular case. It was submitted that *"it is necessary to stand back and look at the whole picture in order to determine whether the activity amounted to a trade."* In the written submissions filed on behalf of the Revenue, they also analysed the facts and evidence by reference to the *"badges of trade"*.

48. Finally, it is submitted that the Commissioner's findings in respect of whether the appellant had made returns containing *"a full and true disclosure of the facts"* were correct and that the appellant has identified no error of law.

Discussion

49. At the outset it is appropriate to note what was not decided by the Commissioner. She did not make any finding in respect of the appellant's intention in relation to the site. Counsel for the appellant pointed to paragraph 53 of the Commissioner's Determination as containing a finding that the appellant, when drawing down the loan, had the intention of developing the site, i.e. that his intention when purchasing the site was to develop it. It is clear from the terms of the paragraph that this was not a finding by the Commissioner. She simply states *"However, while the Appellant **may have intended** on developing the land at the time of drawdown of the loan, no trade of land development is lawful or possible in the absence of planning permission for the said development..."* (emphasis added). Furthermore, this is not contained in the section headed *"Facts proven or admitted"* but rather in the *"Analysis"* section. However, nor is there a finding that the appellant did not intend to develop the site notwithstanding that Revenue submitted to the Commissioner that the appellant intended to build on the land with a view to residing there and the appellant stated in evidence that his intention was to develop properties on the land for resale and to turn a profit.

50. It seems to me that there was ample evidence to support a finding that it was not the appellant's intention to develop the site and that, on the principles applying to appeals by way of case stated, if the Commissioner had reached such a conclusion the Court could not find that such a conclusion was one that no reasonable Commissioner could have reached.

51. However, the Commissioner did not reach such a conclusion and did not base her decision on the absence of such an intention. It seems to me, therefore, that, while it is not expressly stated in the Determination, I must approach the matter on the basis that the Commissioner proceeded on the basis that the appellant had that intention. It seems to me that this is what is meant by paragraph 53 of the Determination.

52. The second general point which can be disposed of at the beginning is that it is beyond dispute that land development is a trade within the meaning of the 1997 Act. The issue in the case is not whether the intended activity was a trade but rather whether the appellant was engaging in that trade in the relevant years in all the circumstances of the case.

53. The third general point is that it is important to identify the trade that the appellant claimed (and claims) to have been engaged in because that is the trade upon which the Commissioner had to decide. This is necessary and important because at paragraph 36 of the written submissions it is said that "*...risks such as failing to get planning/suitable planning or substantial delays are part and parcel of the nature of the business of a person involved in **dealing in** and/or developing land...*" (emphasis added) and at paragraph 38 it is said that "*...Traders and in particular **land dealers** have to take risks...*" (emphasis added). It has never been suggested that the trade in which the appellant was involved or intended to be involved was land dealing. The only trade which the Commissioner was asked to consider (and therefore the only one that she considered) was the trade of land development. The reason this is important is because it potentially goes to the question of when the trade commences and therefore whether at a particular point of time the person is engaged in the trade. Finally, it is obviously of some relevance that the appellant had not previously been involved in the trade of land development. It seems to me that this has some bearing on the question.

54. The *Revenue Commissioners v O'Farrell* case is obviously of key importance. It is very heavily relied upon by the appellant. It was argued on behalf of the Revenue that the case is about more than the *O'Farrell* case and that it would be open to me to conclude that the Commissioner was wrong on her interpretation of *O'Farrell* but right in her determination because the question that is posed for this Court is broader than whether the Commissioner was correct in her interpretation of *O'Farrell*. This is correct insofar as it goes but nonetheless the proper interpretation of *O'Farrell* is of central importance to the case.

55. The appellant essentially submits that the meaning and effect of *O'Farrell* is that if a tax payer purchases land with the intention of developing that land he is immediately, at the

point of purchase, engaged in trade or an adventure in the nature of trade, i.e., the trade of land development. At paragraph 12 of the appellant's written submissions, it is stated "*Per O'Farrell, the trade commences when the person purchases the land, not when the purchaser subsequently obtains planning permission after purchasing the land*" and at paragraph 34 it is submitted that "*In particular the Commissioner failing to take into account and apply the principle that a trader commences trading on purchasing the land for development, not when planning permission is obtained.*"

56. Before dealing directly with *O'Farrell* it is appropriate to refer to the earlier decision of *Spa Estates v Ó hArgain* because Murphy J had to consider this in *O'Farrell*. Underlying the issues in *Spa Estates* was a somewhat complex sale process. Ultimately, *Spa Estates*, a newly established company which had not previously traded, bought land with the intention of developing it and building houses for sale. The land had planning permission for that purpose. Nothing was done by *Spa Estates* to develop the lands or to build on them. For reasons which are irrelevant to the current discussion it was then decided to dispose of the lands but this was to be done by a sale of the shares in *Spa Estates* rather than a direct sale of the lands and what was described by Kenny J as "*a most ingenious scheme for the transfer of the lands*" was evolved. *Spa Estates* ceased to trade. Revenue served a Notice of Assessment in respect of the company's trading year up to cessation of trading. They assessed tax in respect of the sale of these lands on the basis of "profits from property dealing" rather than profits from the trade of builders. *Spa Estates* appealed to the Appeal Commissioners and were unsuccessful and appealed to the Circuit Court. The Circuit Court held that the lands were trading stock and were bought by *Spa Estates* with a view to sale because houses cannot be sold without selling the lands on which the houses sit and "*Spa which was building houses was necessarily trading in land.*" A case stated was sent to the High Court. Kenny J stated inter alia:

"The Revenue contentions are that *Spa* was carrying on the trade of dealing in land and that if they were not, the purchase of the lands at Lucan was an adventure in the nature of trade. The taxpayers contend that they never carried on this trade, that nothing was done to develop the lands or to build houses on them and that the purchase of the lands and the making of applications for planning permission were steps of preparation for carrying on this trade. It is an oversimplification to say that *Spa* were formed to carry on business as builders. The trade which the directors of *Spa* intended to carry on was that of developing land, building houses on them and selling the houses."

It will, of course, be noted that the positions of the parties in the case were the reverse of the parties in the current case. Kenny J went on to say:

"The purchase of the lands and the applications for planning permission seem to me to have been acts preparatory to the carrying on of a trade and not to be evidence that a trade was being

carried on. This view is supported by the decision in The Birmingham and District Cattle by Products Limited .v. The Commissioners of Inland Revenue (1919) 12 Tax Cas. 92.

...

It is true that houses cannot be sold without selling the lands on which the houses are situated. But when no development had been done and no houses have been built, the purchase of the land for the purpose of building does not involve the consequence that the taxpayer was dealing in land. In my view the only possible conclusion on the facts in this case was that Spa never commenced to carry on the trade of developing lands, building houses on them and selling the houses nor did they commence the business of dealing in land. The purpose of the acquisition of the lands was to use them as sites for houses which would be sold by Spa as builders and land developers but not as dealers in property and they never commenced any trade...

The next contention was that the purchase of these lands was an adventure in the way of trade. Trade is defined by s. 237 of the Act of 1918 as including every trade, manufacture, adventure or concern in the nature of trade. The fact that the purchase was the only transaction carried out by Spa does not prevent the transaction being an adventure in the nature of trade because an isolated transaction may be an adventure in the nature of trade. The question whether a transaction is an adventure in the nature of trade is, in my opinion, a question of law on the facts found. (Edwards .v. Bairstaw 1956 A.C. 14: 36 Tax Cas. 207)...

The purchase and sale of land might be an adventure in the nature of trade for a company which had commenced the business of building or for a building company which bought the land with the intention of selling it at a profit. But an isolated purchase of land by a company which had not commenced any trade or business and which did not buy the land with the intention of selling it as undeveloped land is not evidence from which it can be inferred that the purchase was an adventure in the nature of trade."

57. In *O'Farrell*, Mr O'Farrell, the taxpayer bought a site on Shrewsbury Road in Dublin with the intention of developing it by demolishing the existing house and building two new houses (as it transpired he only got planning permission to build one house). He claimed the losses from this project against his other income between 2004 and 2009. The Revenue Commissioners claimed that his purchase of the property was an investment or capital matter and not a trade or revenue matter or alternatively if the activity was deemed to be on the trading side, then the respondent had never in fact commenced the trade of land development. Mr O'Farrell appealed to the Tax Appeals Commissioner. At the appeal, Revenue relied exclusively on *Spa Estates*. The Appeals Commissioner distinguished the *Spa Estates* case and granted the taxpayer's appeal, determining that he was a land developer and that the activity was on the trading side rather than the capital side. The matter was appealed to the High Court by way of case stated. Revenue again relied almost exclusively on *Spa Estates*. They submitted that the Commissioner erred in concluding that the mere purchase of the property (and applications for planning permission) are sufficient to constitute trade (page 11 of *Spa Estates*)

and that there is an important distinction to be made between the set up of a trade and the commencement of a trade. The respondent's case was that the test in *Mansell* applied and the taxpayer should be held to have commenced trading on the date of his purchase of the property, as he had a specific concept in mind and had begun operational activities, i.e., the purchase.

58. Murphy J referred to the decision of the Special Commissioner in *Mansell v Revenue & Customs Commissioners* and said at paragraph 40:

"40. As already stated having reviewed the law on the nature/commencement of trade in various jurisdictions since 1919, the special Commissioner identified a number of principles to be applied in the determination of these issues. They are set out at paragraphs 89 to 94 of the decision:

89..... First before the trade can be said to commence, there must be a fairly specific concept of the type of activity to be carried on.

90. Second: an activity which consists merely of a review of the possibilities in the expectation or hope that information will be obtained to justify going into a business of some kind is not the carrying on of a trade.

91. Third: it is not always necessary that a sale is made or a service supplied before a trade can be said to be commenced. It is tempting to say that a trade commences only when the first sale is made. In normal everyday usage one would say that a person starts trading when he becomes entitled to money from his first customer. But, for the following reasons, it does not seem to me that making the first sale is necessarily the earliest time when a 'trade is Commenced'

(a) there is a small but fine distinction between 'trading starting' and a trade being commenced, which may make everyday usage a pilot slightly out of its home waters;

(b) the comments made by Lord Millet in *Khan v Miah* [2001] 1 All ER (Comm) 282 [2001] All ER 20 tend to suggest that selling the first meal is not the earliest time when trading starts; and

(c) for these purposes the extended definition of trade affects the question. The question becomes; when did the trade, manufacture, adventure or concern in the nature of trade start? In normal usage, an adventure in trade might start before the 'trading' started. An adventure normally starts when the adventurer leaves home, or the merchant first charters his ship rather than when the first monster is killed or the cargo is brought back home and sold.

92. I note that it is possible that for the linguistic reasons noted in para (c) above, there may be somewhat different considerations relevant to when a trade such as buying and selling flowers commences from those relevant to when an adventure in the nature of a trade may commence.

93. It seems to me that a trade commences when the taxpayer, having a specific idea in mind of his intended profit making activities, and having set up his business, begins operational activities – and by operational activities I mean dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trade putting money at risk: the acquisition of the goods to sell or to turn into items to be sold, the provision of services, or the entering into a contract to provide goods or services; the kind of activities which contribute to the gross (rather than the net) profit of the enterprise. The restaurant which has bought food which is in its kitchen and opens its doors, the speculator who contracts to sell what he has not bought, the service provider who has started to provide services under an agreement so to do, have all engaged in operational activities in which they have incurred a financial risk, and I would say that all have started to trade.

94. It does not seem to me that carrying on negotiations to enter into contracts which, when formed will constitute operational activities is sufficient. At that stage no operational risk has been undertaken; no obligation has been assumed which directly relates to the supplies to be made. Not until those negotiations culminate in such obligations or assets, and give rise to a real possibility of loss or gain has an operational activity taken place. Until then, those negotiations may be part of setting up the trade but they do not to my mind betoken its commencement.”

These principles were subsequently approved and adopted by the Chancery division of the High Court in 2009, in the case of Revenue and Customs Commissioners v Micro Fusion (STC) 2009 1741 at page 1778...

41. This Court too is happy to adopt these principles as a fair summary of the law as it has evolved over the past century and to apply those principles to the present case. The respondent like Mr Mansell had a specific idea in mind of his intended profit making activities. Mr Mansell acquired options to purchase lands which had the potential to be developed into a motorway service area. The respondent purchased 28 Shrewsbury Road with the intention of demolishing the existing dwelling and developing two new dwellings on the site. Having secured finance from the bank both for the purchase of the property and for the cost of development, the respondent put his specific idea in train by purchasing 28 Shrewsbury Road. On the Mansell principles that was an operational activity being “dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk.” (Mansell Para 93) On the facts and the principles applied in Mansell, the respondent was engaged in the trade of land development and began his trade of land development on the day he purchased the property with a clear development plan and the financing to develop same. On that date he ventured in the hope of gain and with the risk of loss, from the development of the land.

42. The position of the appellant that the nature and commencement of trade in the development of land was forever fixed by a decision given 42 years ago, on a very complex and different set of facts, during a different regime, is simply untenable ...

43. ... Some developments are large scale, some are small scale. Either way, land development is an adventure in the nature of trade and the adventure begins when the developer purchases the land for the purpose of development."

59. Revenue also drew my attention to paragraph 88 of the judgment in *Mansell*. The Special Commissioner said:

"Section 218 speaks of a trade "set up and commenced" before, or on or after, 6 April 1994. The words "set up" suggest that a trade can be set up without being commenced. This echoes the distinction drawn in Slater (see paragraph 72 above), the distinction between getting ready and commencing in Birmingham Cattle, Lord Millett's observation that "the work of finding, acquiring and fitting out a shop or restaurant begins long before the premises are open for business and the first customer walks through the door", and the assembly of a "sufficient organisational structure" to undertake the essential preliminaries, getting ready to face your customers, purchasing plant, and organising the decision making structures, the management, and the financing. Depending on the trade more or less than this may be required before it is set up."

It will be noted that the statutory provision in question (section 218) distinguishes between "set up" and "commenced". No such statutory distinction exists in the provisions in question here.

60. The appellant submits that *O'Farrell* means that when land is bought by a person with the intention of developing it he is there and then engaged in the trade of land development. The appellant submitted by reference to the principles in *Mansell* (and in particular in paragraph 93 of the judgment) that:

"31) In the present Appeal the Appellant gave evidence, inter alia, that he:

- a) had a specific idea in mind as a profit-making activity, in particular the dealing in and/or developing land;
- b) purchased the land as trading stock;
- c) began operational activities, including in particular the purchase of a site for development and/or sale, engaging with experts and manufacturers/builders;
- d) had dealings with third parties immediately and directly related to supplies to be made which it was hoped would give rise to profits, including in particular the purchase of a site for development and/or sale, engaging with experts and manufacturers/builders;

- e) put substantial monies at risk (including his purchase monies and other monies) in the purchase of the land and incurring expenditure to third parties including agents, manufacturers and recurring interest on borrowings;
- f) acquired goods to sell or turn in to goods to be sold in the form of the land;
- g) did all of the above in the hope that it would give rise to profits"

61. *O'Farrell* is not as black and white as is contended for by the appellant.

62. I do not interpret *O'Farrell* as suggesting that any one factual matter can in all cases be determinative of whether a person is engaged in the trade of land development. Murphy J's statement at paragraph 43 of her judgment that "*Either way, land development is an adventure in the nature of trade and the adventure begins when the developer purchases the land for the purpose of development*" must be seen (a) in the context of the arguments that she was being asked to determine and (b) in the context of the factual background and the judgment as a whole. As noted above, in *O'Farrell*, the argument advanced by Revenue was entirely reliant on *Spa Estates v Ó hArgáin* in which Kenny J decided on the circumstances of that case that the purchase of the land did not establish that the taxpayer was engaged in trade. Therefore, the real issue to be decided by Murphy J was whether the purchase of the land for the purpose of development was sufficient to establish that the person was engaged in trade rather than determinative of the question whether in all cases where land was purchased for the purpose of development the purchaser was immediately engaged in the trade. Secondly, in *O'Farrell*, the facts were that when the taxpayer bought the property, he had an agreement with the bank for financing to purchase and develop the lands and he had a development plan. That Murphy J considered these to be relevant factors in the assessment of whether the taxpayer was engaged in trade is clear from paragraph 41 where Murphy J, having adopted the principles in *Mansell*, said: "*...The respondent purchased 28 Shrewsbury Road with the intention of demolishing the existing dwelling and developing two new dwellings on the site. **Having secured finance from the bank both for the purchase of the property and for the cost of development**, the respondent put his specific idea in train by purchasing 28 Shrewsbury Road. On the Mansell principles that was an operational activity being "dealings with third parties immediately and directly related to the supplies to be made which it is hoped will give rise to the expected profits, and which involve the trader putting money at risk."*(*Mansell*, Paragraph 93) *On the facts and the principles applied in Mansell, the respondent was engaged in the trade of land development and **began his trade of land development on the day he purchased the property with a clear development plan and the financing to develop same**. On that date he ventured in the hope of gain and with the risk of loss, from the development of the land.*" (emphasis added)

63. Taking account of such factors is also consistent with the long line of authority to the effect that in assessing whether the taxpayer is engaging in trade the Court (or the Tax Appeals Commissioner) must have regard to all of the circumstances. As noted above, this is clear from *Cooper, Ransom v Higgs, Spa Estates v Ó hArgáin*, and *Mara v Hummingbird* [1982] ILRM 421.

64. An interpretation of *O'Farrell* to the effect that it is authority for the proposition that any one factor or even combination of factors is determinative in all cases is inconsistent with this long-established approach. It would also be contrary to logic. The end point of an interpretation that a person must be determined as being engaged in the trade of land development from the moment he purchased the land with the intention of developing it is that he must be determined to be engaged in trade even if has no plans to develop the land immediately or within any particular time scale. A person who was not or had never previously been engaged in the trade of land development could buy land with the intention of developing it at some undefined point in the future (which may or may not ever occur) and would have to be determined to be engaged in trade from the moment of purchase on and perhaps for a very long number of years. That is, of course, an extreme scenario but it is illustrative of the illogicality of an interpretation of *O'Farrell* that one factor or combination of factors can or, indeed, must be determinative. In my view, the significance of the reference by Murphy J to the taxpayer in that case coming to the project with a development plan and financing for the development costs and that he had applied for planning permission is that she was assessing all of the circumstances. This is also the relevance of Murphy J's assessment of the fact that Mr O'Farrell was renting out the house on the lands whilst going through the planning process.

65. As noted above, the Commissioner stated that *O'Farrell* was authority for the proposition that trade commences at the moment of purchase of the land for the purpose of development. This would appear to suggest that the Commissioner interpreted *O'Farrell* as meaning that the purchase of lands for the purchase of development is itself determinative. Stated in such bald terms, it seems to me that this interpretation is incorrect. However, the Commissioner then in fact adopted the approach of taking all of the circumstances into account including questions such as zoning, the fact that there was no planning permission, that no application for planning permission was made or has been made, and that there was no formal agreement for financing the development costs. It seems to me that this is what was meant by paragraph 51 of her Determination. I am satisfied that this was the correct approach on the basis of *O'Farrell*. She took these into account by considering the factual distinctions between this case and *O'Farrell*, notwithstanding that in both cases the tax-payer had bought the land with the intention of developing it. It seems to me that the validity or relevance of the points of distinction goes to the conclusions reached rather than the general approach.

66. Whether the Commissioner correctly took these factors into account and reached a reasonable conclusion are, of course, separate matters from whether she adopted the correct general approach. The appellant's primary case is that the Commissioner was not entitled to

take these factors into account at all because the purchase of the lands (with the intention of developing them) is determinative. However, he also argues in the alternative that some of the matters which the Commissioner took into account were irrelevant and, even if they were relevant, the manner in which she did so was in error.

67. It is therefore necessary to look at these factors and how they were treated by the Commissioner. None of these matters can in themselves be determinative. Indeed, as discussed above, to treat any one of them or any combination of them as automatically determinative would be inconsistent with the obligation to consider all of the circumstances. However, it also goes further than that. It would be illogical and inconsistent with the concept of "trade" to treat the absence of planning permission, for example, as automatically determining that a person who did not have planning permission was not engaging in trade because to do so would be to entirely disregard the element of risk which is inherent in most areas of trade. For example, a person may purchase a site with the intention of building ten houses on it for resale and immediately set about applying for planning permission and be refused, rendering the land of far less value than would have been the case if he had secured planning permission and sold the ten houses. That is one of the risks of trade. It seems to me that the mere fact that the individual was refused planning permission could not be dispositive of the question of whether he was engaging in trade. Similarly, the fact that the person did not have financing for the development at the point of purchase could not in itself be determinative because, for example, the bank may not be prepared to formally agree to give development finance in advance and might only be prepared to negotiate same following purchase.

68. However, I do not believe that this was the approach adopted by the Commissioner. It is correct to say that the questions of zoning and planning permission loomed large in the Commissioner's mind. These were the questions of the incorrect zoning and the absence of planning permission but also the fact that no application for planning permission was made. She did not determine the appeal merely on the basis of the lands' zoning status or the fact that it did not have planning permission or that the zoning might not be changed or that planning might not be obtained. Rather she had regard to all of the following circumstances: (i) the intention of the appellant, (ii) that no development in this case could lawfully proceed since the land was purchased in 2005 due to the zoning and absence of planning permission, (iii) that the appellant had not applied for planning permission at any stage, (iv) planning permission and a change in zoning could not be assured, (v) there were no sewage facilities or water mains on site and the appellant had sunk a small well, and (vi) there was no written agreement with the bank that they would provide financing for the construction of the development. She distinguished *O'Farrell* on the basis of some of these points. She noted that in *O'Farrell* there was no doubt about the viability of developing the site because there was already a residential property on the site and, indeed, the taxpayer did secure planning permission (though for one house rather than two), that in *O'Farrell* the taxpayer had a formal agreement with the bank for financing the cost of construction, and that the taxpayer in

O'Farrell was a homeowner and his family home was situated on the same road. The Commissioner dealt with these matters at paragraphs 52 – 59 of her Determination.

69. The approach of the Commissioner was to have regard to all of the circumstances. That is the correct approach.

70. The appellant made a number of specific complaints about some of these points, particularly in paragraphs 32-43 of his written submissions. I have already addressed the substance of some of them during the course of the discussion above.

(i) He addresses paragraph 53 of the Determination in which the Commissioner says that *"while the Appellant may have intended on developing the land at the time of drawdown of the loan, no trade of land development is lawful or possible in the absence of planning permission for the said development. In this appeal, having purchased the property in 2005, the Appellant has not submitted an application for planning permission and has not obtained planning permission either in the twelve year period to the raising of the assessments in July 2017, nor in the additional two year period to the hearing of the appeal in June 2019."* He submits that there *"is no basis or authority for the Commissioners view that no trade of land development is lawful or possible until planning permission is obtained"*. The complaint is that the Commissioner was concluding that the trade of land development could not be engaged in without appropriate zoning and planning permission. In my view, this overly parses paragraph 53 in isolation from the rest of the Determination. It must be read in its overall context. The Commissioner was clearly referring, correctly, to the factual position that the land could not be developed without planning permission. This is clearly stated in paragraph 60 of the Determination where she says *"...in the absence of planning permission in circumstances where the land was zoned agricultural and required a change of use, it is clear that no development in this appeal could lawfully proceed at any point since the land was purchased in 2005..."* and that *"...the absence of planning permission during the tax years of assessment 2008 to 2015, posed a fixed impediment to the commencement of construction and development on the land, in those years and beyond..."* The statement that development could not take place because of the land's zoning and the absence of planning permission is indisputably correct.

It is also submitted by the appellant that this paragraph *"fails to take account that the land was purchased as trading stock and could have been sold at a profit or a loss at any stage with or without planning permission or a change in zoning and with or without development and would have been a trading transaction."* In my view, that highlights what I describe as the illogicality of the mere fact of the purchase for the purpose of development being treated as determinative of whether the taxpayer is engaging in the trade of development. It means that a person could purchase land with the intention of

developing it but never do so or even take any steps whatsoever towards doing so, sell it many years later and in the meantime be able to claim loss relief on the basis of engaging in the trade of development. There is, of course, a difference between a party who has never been involved in the trade of land development and a person who has been or is involved in the trade. This is not a difference of principle but it is simply one of the matters to be taken into account.

Finally, it is submitted that the conclusion is inherently absurd because if the appellant had subsequently obtained planning permission, the trade would be deemed to have commenced at the date of the purchase of the land, thereby giving a retrospective effect to the *O'Farrell* decision. I think that misunderstands the decision of the Commissioner. She examined the circumstances and her conclusion was that in the years 2005-2015 the appellant was not engaging in trade because there was no planning permission and he did nothing to obtain planning which was a prerequisite to him being able to give effect to his stated intention of building on the lands. It does not follow that he had to obtain planning permission in order for the Commissioner to be satisfied that he was engaging in the trade or that if he obtained such planning permission, it would necessarily follow that it would have retrospective effect on the assessment of the activity. To take the extreme example again: if a person bought land with the intention of developing it at some undefined point in the future and ultimately developed it thirty-five years later (post-retirement, for example) it does not necessarily follow that he was engaging in trade in the meantime.

(ii) The appellant also takes issue with paragraph 55 of the Determination where the Commissioner distinguished the *O'Farrell* case on the basis that there "*was no doubt about the viability of developing the site purchased*" and it is submitted that this amounts to the Commissioner viewing "*the viability of the project, with perfect 20:20 vision.*" This misunderstands the meaning of paragraph 55. The Commissioner was not determining whether or not the project was viable but was comparing the circumstances in the *O'Farrell* case and those in the instant case as part of her assessment as to whether the decision in *O'Farrell* determined this matter.

(iii) In paragraphs 56 and 57 of her Determination, the Commissioner refers to the fact that in *O'Farrell* the taxpayer had secured finance from the bank for the cost of construction whereas in this case there was no written agreement from the Bank to finance the construction of the development. I have already referred to Murphy J's references to the fact that the taxpayer in *O'Farrell* had finance from the bank for the cost of construction. The appellant (in paragraph 41 of his submissions) submits that "*The Appellant gave evidence that there was a verbal arrangement that finance the (sic) construction would be provided and that this evidence was unchallenged. There*

was no evidence controverting the Appellant's evidence and there was (sic) no factual finding by the Commissioner that there was no finance in place. There is therefore no basis for any attempt at distinguishing the present Appeal from O'Farrell on this basis."

Firstly, the Commissioner does in fact record at paragraph 57 of the Determination that there was an understanding in place between the appellant and the bank that the bank would finance the construction. It is not suggested by the appellant that he had a written agreement to that effect. He says there was a "verbal arrangement". The Commissioner therefore accurately recorded the appellant's position. She also said that *"There was no independent evidence in support of the verbal understanding and no confirmation on behalf of the Bank that this was the case."* This is not disputed in any way by the appellant. Indeed, it was stated by the appellant in his letter to the Commissioner of the 27th January 2015 (quoted above) that *"...Once permission for one house was obtained, I would apply for further financing..."* Secondly, it seems to me that this is an absolutely valid point of distinction between the two cases. The existence of the agreement for the bank to provide finance was part of Murphy J's decision. Even adopting a common-sense approach to matters, there is a world of difference between a concluded agreement to provide finance and an understanding or verbal arrangement that same would be provided, particularly in the absence of any evidence of the terms or details of that arrangement.

(iv) The appellant also refers to the contents of paragraph 58 of the Determination in which the Commissioner refers to the "factual difference" that Mr. O'Farrell was a home owner and his family home was on the same road as the proposed development whereas the appellant was renting a house and lived elsewhere. The appellant describes this as entirely trivial and irrelevant. It is, of course, correct that these are factual differences between the two cases. However, they are differences which could only be relevant to the question of whether the appellant intended to develop the site for sale or whether he intended to live in the house that he was proposing to build. In circumstances where the Commissioner did not in fact determine whether or not he had this intention to develop the property for sale (and I have therefore proceeded on the basis that she accepted that this was his intention) it could not be relevant to the question of whether he was engaged in trade.

71. I was also referred to the "badges of trade" identified by the 1954 Royal Commission. These are undoubtedly helpful in a general sense. However, I find them to be of limited assistance in the circumstances of this case. The "badges" are:

- (a) Subject matter realised
- (b) Length of period of ownership
- (c) Frequency and number of transactions
- (d) Supplementary work on or in connection with the property

- (e) Circumstances giving rise to the realisation of the property
- (f) Motive.

72. As these are really only intended as a sort of guidance or “yardstick” (Lord Denning said in *JP Harrison v Griffiths* [1962] 1 All ER 909 that “*The only thing to do is to look at the usual characteristics of a ‘trade’ and see how this transaction measures up to them*”) I do not propose to consider them at any length.

73. The first is the “subject-matter of the realisation” and it is said that the items in question by their very nature may well be decisive in characterising the activity in relation to them as trade. For example, the purchase of one million rolls of toilet paper was held to be a trade as it could not seriously be considered as an investment (*IRC v Rutledge* (1929) 14 TC 490). Land in itself is not decisive in the same way. I accept that land is something which can, and often is, involved in trading transactions. However, equally, it is something which is very frequently involved in investment transactions or indeed in transactions for a person’s own use, i.e., The purchase of a house or a site to build a house. Thus, the fact that the subject matter of the transaction is land is not of any assistance. I should also note that the appellant characterises the subject matter as “development land”. I do not think that is the proper way to characterise it for the purpose of this part of the discussion. The subject matter of the transaction is land; it becomes “development” land through the purpose for which the person bought it. There may be cases in which a parcel of land may be described as “development land” at or before the purchase due to certain features such as (and these are just examples) existing planning permission for development, zoned residential, access to water mains. These are not present in this case.

74. The second badge is “duration of ownership”. The appellant notes that “*a short period of ownership or quick turnaround could indicate the mark of trade because assets acquired for investment would generally not be re-sold immediately*”. Of course, in this case the asset had been held by the appellant for approximately sixteen years at the time of the Determination. However, I accept that this is not conclusive and the appellant has explained why he held onto the asset for such a long period of time. The appellant also relies on his intention that he would sell it on. I do not believe that intention goes to this badge. The badges (other than the last one) are objective.

75. “Frequency of similar transactions” is the third badge. The appellant had not been engaged in this sort of activity before and therefore this is simply of no assistance. Again, the appellant submits that his intention was that he would have performed several such transactions from this site but that does not go to the objective question of how frequent were the transactions.

76. The fourth “badge” is “Supplementary work on or in connection with the property”. Making improvements to an asset and setting up a structure in order to facilitate its sale can be signs of trade. I accept that the appellant’s intention to build on the lands would add value to the lands but in this case no supplementary work has been carried out on or in connection with the property.

77. “Circumstances responsible for the realisation” is the fifth badge. As the lands were not realised, it is impossible to reach any conclusion under this heading. The appellant makes the point that it was his intention that they would be realised by the sale of the house(s) which were going to be developed but this badge is concerned with the actual sale and not with what was or is intended by the person.

78. The final badge is the taxpayer’s “motive”. It seems to me that where it is necessary to proceed on the basis that the appellant’s intention was to develop the lands and sell the house(s) which it was intended to build then it follows that his intention was to make a profit.

79. Because of the particular circumstances of this case it seems to me that these badges are of little assistance.

80. I am fully satisfied that the Commissioner was entitled to have regard to all of the circumstances relating to zoning, planning permission (including that no application was made by the appellant), finance and the question of the viability of the project and that she adopted the correct approach in doing so and in the manner in which she did so. I am also fully satisfied that were it not for the issue discussed in the following paragraph the conclusion drawn by the Commissioner from this evidence, proven or admitted facts is supported by that evidence and is well-within the range of decisions that a reasonable Commissioner could draw.

81. However, it seems to me that in reaching her conclusion the Commissioner did not have proper regard to the fact that the appellant incurred professional fees to Design Venture Limited for house design and planning application and to Huf Haus GmbH post-purchase. These are treated as facts proved or admitted by the Commissioner. There was also evidence that he engaged a local planning agent to whom he paid a sum of in excess of €3000. These are all activities which are consistent with an intention to develop the lands. Of course, they are also consistent with the construction of a house for the appellant’s own use but in circumstances where it was put to him that he intended to live in the house and he denied that and the Commissioner made no finding to that effect, it seems to me that they have to at least be considered as part of the assessment of whether he was engaging in trade. An interesting feature of the case is that the appellant did not claim these costs towards his losses. However, he is not obliged to claim for any particular item. His failure to do so may, of course, go to the question of his intention but that is not an issue in this appeal.

82. In those circumstances, they should have been considered in the mix along with the other factors discussed above. As noted, the Commissioner carefully recorded some of these matters as facts proved or admitted and others as matters given in evidence. However, they do not feature in the "Analysis" section of her Determination. As discussed at length above, a core of the Commissioner's Determination is that the appellant did not have planning permission and did not seek it, the significance of this being that he did nothing to put himself in a position to be able to develop the lands after he had bought them. However, it seems to me that the engagement and payment of design and planning consultants potentially goes directly to that issue. As I have held above, the Court (and the Commissioner) must have regard to all the relevant circumstances and it seems to me that the omission by the Commissioner to have regard to these facts and to weigh them in the mix with the other relevant factors in the course of her very careful and considered Determination means that she did not have regard to all of the evidence and facts and therefore reached a determination that could not have been reached by a reasonable Commissioner, i.e., a determination which did not properly consider all of the relevant matters.

83. This point was not raised squarely by the appellant and I therefore considered whether it was appropriate to have regard to it. However, it is submitted in paragraph 28 of the appellant's written submissions that "*...there is clear objective evidence of the objectives of the Appellant, which are accepted by the Commissioner in her Determination. It was anticipated from the outset that the Appellant's (sic) would develop the lands and sell them on, you (sic) incurred substantial costs in relation to the borrowings, planning and experts which it is submitted is clearly the kind of objective evidence of activity that can demonstrate a trading type motive.*" (emphasis added). At paragraph 31 (which is quoted above) reference is made to the appellant having engaged with experts and "*incurring expenditure to third parties including agents...*". These points were also reflected in the appellant's "Outline of Arguments" to the Commissioner. Thus, it seems to me that these facts were part of the case. Furthermore, this is a case stated for the opinion of the High Court and the Commissioner asked whether "*...upon the facts proved or admitted, the evidence adduced...I was correct in law in my determination that the Appellant was not conducting a trade of land development...*" The question of whether she took account of all relevant factors goes to that question. In addition, it seems to me that the fact that the point was not raised squarely can be dealt with by the Order to be made by the court which I turn to below.

84. A point which is canvassed in the written submissions is whether there was a change of mind involved on the part of the appellant. It will be recalled that he decided after the economic crash in 2007 to put the development on pause. This potentially gives rise to the interesting question of whether such a decision must have the effect that he was not engaging in trade following that decision. However, it was not part of the Commissioner's Determination in relation to the question of whether or not he was engaging in trade that he had been engaging in trade but ceased to do so in 2007 (though it was part of her decision in relation to whether

he had made full and true returns). Her Determination was that he was not engaging in trade at any point from 2005 so the question of whether the effect of this decision was a cesser of that trade simply did not arise and was not determined in relation to the first question. I therefore have not considered it.

85. In those circumstances, I must answer the first question "No". Section 949AR of the 1997 Act provides that the Court may, inter alia, reverse, affirm or amend the Determination of the Commissioner or may remit the matter to the Commissioner with its opinion on the Determination. In light of my reasoning and the basis upon which I determined that the answer to the first question must be "No" it seems to me that the appropriate way to deal with the matter is to remit the matter to the Commissioner. However, I will hear the parties on this point. It is also my provisional view that in light of my reasoning and if the matter is to be remitted then I should not answer question no. 2. I will, however, hear from the parties on this point also and in particular whether I am required to answer all questions asked in light of the terms of Section 949AR. I will list the matter before me to consider these points.