APPROVED **[2025] IEHC 122**

THE HIGH COURT

Record No.: 2024/36 R

BETWEEN:

GUNTHER FALKENTHAL

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

JUDGMENT of Mr Justice Rory Mulcahy delivered on 7 March 2025

Introduction

1. On 12 November 1998, the respondent ("**Revenue**") sent the appellant ("**Mr Falkenthal**" or "**the appellant**") a notice pursuant to s. 811(6) of the Taxes Consolidation Act 1997 ("**the Notice of Opinion**"). The Notice of Opinion stated that an investment by Mr Falkenthal in Albany Partners under the terms of a partnership agreement dated 25 March 1997 concerned with the acquisition, distribution and licensing of films was a tax avoidance transaction within the meaning of s. 811 of the Taxes Consolidation Act 1997 ("**the TCA 1997**"). It stated that the tax advantage to Mr Falkenthal of the transaction, calculated at IR£31,252.80, would be withdrawn if the Notice of Opinion became final and conclusive. The Notice referred to Mr Falkenthal's right of appeal under s. 811(7) of the TCA 1997.

2. This case stated concerns the extent of Mr Falkenthal's rights of appeal.

3. Mr Falkenthal, as he was entitled to, appealed the Notice of Opinion to the Appeal Commissioners. This appeal was unsuccessful. He appealed from there to the Circuit Court. This appeal was also unsuccessful. In a comprehensive written judgment dated 27 October 2004, the court (Judge Matthews) concluded that Revenue was entitled to take the view that the transaction was a tax avoidance transaction. He dismissed the appeal and concluded that the opinion should stand.

4. Mr Falkenthal then sought to appeal by way of case stated from the Circuit Court to the High Court. There seems to have been considerable delay before that case stated was listed for hearing. However, on the morning it was due to be heard, 16 October 2012, the case stated was compromised on written terms ("**the Settlement**") pursuant to which Mr Falkenthal agreed to withdraw his appeal by way of case stated. The Settlement includes an express agreement by Mr Falkenthal "*to be bound by the decision of the Circuit Court*".

5. As a consequence of that agreement, Revenue wrote to Mr Falkenthal on 10 April 2013 stating that the Notice of Opinion had become final and conclusive in light of the Settlement ("**the Demand Letter**"). The Demand Letter stated that, therefore, Revenue was withdrawing the loss relief claimed and requested that Mr Falkenthal remit the additional income tax due within 30 days. For reasons which weren't addressed at the hearing of the case stated, the amount demanded, €34,670.00, was *less* than the sum set out in the Notice of Opinion, but unsurprisingly, this is not the focus of Mr Falkenthal's complaint in these proceedings.

6. Notwithstanding the Settlement, rather than pay the amount demanded as (apparently) agreed by him, Mr Falkenthal wrote to Revenue by email dated 8 May 2013. He stated that Revenue had no entitlement to withdraw relief, and its demand was invalid. In addition, he claimed, *inter alia*, that the demand was made "*subject to appeal under Section 955 of the Act, on the grounds that Section 955(2) precludes payment of tax after the time specified in the section.*" He also argued that the demand was precluded by the time limits in section 956(2) of the Act.

7. Revenue replied, noting that as the Notice of Opinion had said that if the opinion became final and conclusive, relief would be withdrawn, and the Settlement had rendered the opinion final and conclusive, it did have the power to withdraw relief. In addition, its

letter stated that any right of appeal under s. 955(3) was excluded by the provisions of s. 811(5A) of the TCA 1997. It noted that s. 956 was of no application. That provision relates to the making of further enquiries by Revenue and imposes a time limit thereon. However, as Revenue was not seeking to make any further enquiries, that provision simply didn't arise. The letter stated that Revenue would issue an amended assessment shortly. It did so on 29 May 2013. The sum claimed in the amended assessment was €34,583.70, again, for reasons unaddressed at the hearing, for an amount lower than in the Notice of Opinion and, indeed, marginally lower than in the Demand Letter.

8. Mr Falkenthal sought to appeal the notice of amended assessment by letter dated 21 June 2013, referring again to s. 955(2) and 956(2).

9. By decision dated 26 June 2013, Revenue advised that an appeal did not arise, *i.e.*, there was no entitlement to appeal, in light of the provisions of s. 811(5)(d) of the TCA 1997, which disapplied the *rights of appeal* contained in ss. 955(3) and 956(2), and s. 811(5A) of the TCA 1997, which disapplied the *time limits* contained in ss. 955(2) and 956(1).

10. Mr Falkenthal then appealed *that* refusal to the Appeal Commissioners. Appeal Commissioner O'Callaghan upheld the refusal in an *ex tempore* decision dated 1 May 2015. As appears therefrom, Commissioner O'Callaghan concluded that the right of appeal had been excluded by each of s. 811(5A), s. 957(1)(c) and s. 811(5)(d) of the TCA 1997.

11. Mr Falkenthal then requested that Commissioner O'Callaghan state a case regarding this refusal, although it appears that he never identified a point of law for the opinion of the High Court.

12. Revenue contested the jurisdiction to state a case following a refusal to entertain an appeal. However, Commissioner O'Callaghan formed the view that there was such a jurisdiction and by letter dated 13 October 2015, he expressed his agreement to state a case. However, before the case stated was completed, he vacated his office.

13. There was, it seems, considerable correspondence about how to proceed thereafter. It should be noted that following the decision of Commissioner O'Callaghan to state a case, the Tax Appeals Commission was established on 21 March 2016 in accordance with the provisions of the Finance (Tax Appeals) Act 2015 ("**the 2015 Act**"). The functions of the

Appeal Commissioners were transferred to this new body. No issue arises in this case stated by reason of the transfer of functions.

14. On 10 January 2019, the Tax Appeals Commission ("**TAC**") wrote to the parties, in accordance with s. 29(4) of the 2015 Act, asking whether they wished to have the appeal re-heard or required the completion of the case stated. Mr Falkenthal requested that the appeal be re-heard, but Revenue did not agree. Absent agreement to re-hearing, s. 29(6) of the 2015 Act required the TAC to complete the case stated and sign it. Ultimately, the TAC signed a case stated on 25 January 2024.

15. The case stated was signed by Appeal Commissioner Millrine. Having regard to the fact that the case stated was signed by a commissioner who had not heard the application and that there was no formal Determination by the Commissioner who did hear the application, it is in somewhat unusual form. The required contents of a case stated are set out in s. 949AQ of the TCA 1997. The case stated contains headings mirroring the requirements of that section, but, by way of example, under the heading '*Material Findings of Fact'*, the case stated provides:

> *Section 949AQ(1)(a)(i) TCA 1997 sets out that the Case Stated shall contain the Appeal Commissioner's material findings of fact. Given the unusual nature of this Case Stated, there are no material findings of fact found herein, as there is no Determination in this Case Stated, only a transcript of the decision to refuse to admit an appeal.*

16. The transcript is attached as an exhibit to the case stated.

17. The case stated was heard before me on 30 January 2025, more than 26 years after Revenue first issued the Notice of Opinion withdrawing Mr Falkenthal's tax relief.

18. The only issue in the case stated is as follows:

> *Did Appeal Commissioner O'Callaghan err in upholding the decision of the Respondent to refuse the Appellant's appeal?*

19. In order to help understand how this question arises, I propose to set out the relevant statutory provisions and then explain the parties' arguments in relation thereto by reference

to the case law on which they rely. First, however, I should address a preliminary application by Mr Falkenthal, that the case should be remitted to the TAC for re-hearing.

Preliminary application

20. At the outset of the hearing, the appellant's counsel applied to have the case stated remitted to the TAC, on the basis of an objection to the form of the case stated, arguing that it did not comply with the provisions of s. 94AQ(1)(a) of the TCA 1997. He relied on the jurisdiction to remit a case stated to the TAC for rehearing, pursuant to s. 949AX, where the court formed the view that proceeding to deal with the case stated "*would not, by reason of the relevant circumstances, be consistent with the due administration of justice*". This was not an objection which had been addressed in the appellant's written submissions or flagged to Revenue in advance of the hearing.

21. Counsel for the appellant initially argued that:

> "*[T]his should be a de novo appeal relating to all matters under original dispute. This is not just an appeal to be confined to the issues of whether Mr. Falkenthal has a right of appeal to the High Court in respect of Mr. O'Callaghan's decision in the substantive issue.*"

22. However, he subsequently appeared to moderate his position, suggesting that the matter go back to the stage it was at when Commissioner O'Callaghan retired. It will be recalled that at that stage, Commissioner O'Callaghan had rejected the appellant's application to appeal but had agreed to state a case.

23. Revenue opposed the application and asked the court to deal with the case stated.

24. I could and can see no purpose which remittal to the TAC would serve and accordingly refused the application.

25. The first basis upon which remittal was sought, for the purpose of a 'full' appeal was, in effect, an application that the case stated be resolved in the appellant's favour. The court

could not possibly have remitted the case to the TAC for a full hearing without first deciding whether the appellant was entitled to such a hearing, the very issue in the case stated.

26. Nor did any purported infirmity in the form of the case stated justify remittal, simply for the purpose of having a new case stated on the same issue. Although not precisely in a form which mirrors the terms of section 949AQ, the inclusion of the transcript with the case stated means that more than sufficient information was provided to enable the court to determine the legal issue in the case stated. If remitted, the first issue which the TAC would have to decide was whether the appellant has a further right of appeal. No useful purpose could be served by further delaying a matter of significant antiquity, by sending it back to the TAC with this question unanswered.

27. Clearly the court has jurisdiction to refuse to proceed with a case stated where proceeding would not be in the interests of justice, but I could see no injustice in proceeding in this case. The appellant had not been prevented by any purported infirmity in the case stated from filing legal submissions, nor did he identify any prejudice. I indicated that the appellant could renew his application if an issue arose which made that appropriate. No further application was made.

Relevant statutory provisions

28. S. 933(1) provides as follows:

> *(a) A person aggrieved by any assessment to income tax or corporation tax made on that person by the inspector or such other officer as the Revenue Commissioners shall appoint in that behalf (in this section referred to as "other officer") shall be entitled to appeal to the Appeal Commissioners on giving, within 30 days after the date of the notice of assessment, notice in writing to the inspector or other officer.*
>
> *(b) Where on an application under paragraph (a) the inspector or other officer is of the opinion that the person who has given the notice of appeal is not entitled to make such an appeal, the inspector or other officer shall refuse the application and notify the person in writing accordingly, specifying the grounds for such refusal.*

(c) A person who has had an application under paragraph (a) refused by the inspector or other officer shall be entitled to appeal against such refusal by notice in writing to the Appeal Commissioners within 15 days of the date of issue by the inspector or other officer of the notice of refusal.

(d) On receipt of an application under paragraph (c), the Appeal Commissioners shall request the inspector or other officer to furnish them with a copy of the notice issued to the person under paragraph (b) and, on receipt of the copy of the notice, they shall as soon as possible—

(i) refuse the application for an appeal by giving notice in writing to the applicant specifying the grounds for their refusal,
(ii) allow the application for an appeal and give notice in writing accordingly to both the applicant and the inspector or other officer, or
(iii) notify in writing both the applicant and the inspector or other officer that they have decided to arrange a hearing at such time and place specified in the notice to enable them determine whether or not to allow the application for an appeal.

29. It is thus clear that Revenue is entitled to refuse an application to appeal on the grounds that the person who has given notice of the appeal "*is not entitled to make such an appeal*". It is, moreover, clear that a person can appeal *that* refusal to the TAC, which can determine, with or without a hearing, whether to allow the application to appeal. In this case, Revenue refused to allow an appeal and the TAC, following a hearing, refused to allow an appeal of that decision. Though the appellant's legal submission suggest that the "*net issue*" is whether he is "*entitled to his appeal pursuant to s.933(1)(c)*", in fact, no issue arises regarding his entitlement to submit an appeal under s. 933(1)(c) against Revenue's decision that the person who submitted the appeal was not entitled to appeal. Nor is any issue raised about the jurisdiction of the TAC to have refused to allow an appeal. Rather, the appellant's complaint is that in the circumstances of this case, the TAC erred in law in so doing.

30. The appellant argues that he was entitled to exercise the right of appeal provided for in s. 955(3) of the TCA 1997 and that Revenue and the TAC erred in concluding otherwise. S. 955(1) of the TCA 1997 permits Revenue to raise an amended assessment to tax. However,

s. 955(2) imposes a time limit within which Revenue must raise such amendment assessment:

> *(2) (a) Where a chargeable person has delivered a return for a chargeable period and has made in the return a full and true disclosure of all material facts necessary for the making of an assessment for the chargeable period, an assessment for that period or an amendment of such an assessment shall not be made on the chargeable person after the end of the period of 4 years commencing at the end of the chargeable period in which the return is delivered and no additional tax shall be payable by the chargeable person and no tax shall be repaid to the chargeable person after the end of the period of 4 years by reason of any matter contained in the return.*
>
> *(b) Nothing in this subsection shall prevent the amendment of an assessment—*
> *…*
> *(iii) to take account of any fact or matter arising by reason of an event occurring after the return is delivered…*

31. S. 955(3) permits an appeal against an amended assessment on the basis, in effect, that it has been made out of time, *i.e.*, more than four years after the taxpayer has delivered a return containing a full and true disclosure of all material facts:

> *(3) A chargeable person who is aggrieved by an assessment or the amendment of an assessment on the grounds that the chargeable person considers that the inspector was precluded from making the assessment or the amendment, as the case may be, by reason of subsection (2) may appeal against the assessment or amended assessment on those grounds…*

This is the right of appeal which the appellant purported to exercise in 2013.

32. As noted above, he also sought to appeal under s. 956(2) of the TCA 1997. S. 956 permits Revenue to make enquiries for the purpose of amending an assessment, notwithstanding that an assessment has already issued. However, as with s. 955(2), there is a four-year time limit within which such enquiries must be made. As noted by Revenue in 2013, it was not seeking to exercise any power under s. 956 at that time, and therefore, s.

956 is really of no relevance in these proceedings. As will be seen, the arguments regarding the right of appeal under s. 955 apply to the right of appeal under s. 956 in any event.

33. Revenue contends that there are three applicable statutory provisions by which Mr Falkenthal's further right of appeal was excluded. Two were expressly relied on in its decision of 26 June 2013, all three were relied on by Commissioner O'Callaghan in his decision of 1 May 2015.

34. The Notice of Opinion the subject matter of these proceedings issued pursuant to s. 811 of the TCA 1997 which is addressed to so-called "tax avoidance transactions". Per s. 811(2), a transaction is a tax avoidance transaction within the meaning of s. 811 if:

> *[T]he Revenue Commissioners form the opinion that—*
>
> *(i) the transaction gives rise to, or but for this section would give rise to, a tax advantage, and*
>
> *(ii) the transaction was not undertaken or arranged primarily for purposes other than to give rise to a tax advantage…*

35. S. 811(4) sets out the scope of Revenue's powers in relation to tax avoidance transactions:

> *(4) Subject to this section, the Revenue Commissioners as respects any transaction may at any time—*
> *(a) form the opinion that the transaction is a tax avoidance transaction,*
> *(b) calculate the tax advantage which they consider arises, or which but for this section would arise, from the transaction,*
> *(c) determine the tax consequences which they consider would arise in respect of the transaction if their opinion were to become final and conclusive in accordance with subsection (5)(e)…*

36. S. 811(5) then provides as follow:

> *(a) Where the opinion of the Revenue Commissioners that a transaction is a tax avoidance transaction becomes final and conclusive, they may, notwithstanding any*

other provision of the Acts, make all such adjustments and do all such acts as are just and reasonable (in so far as those adjustments and acts have been specified or described in a notice of opinion given under subsection (6) and subject to the manner in which any appeal made under subsection (7) against any matter specified or described in the notice of opinion has been finally determined, including any adjustments and acts not so specified or described in the notice of opinion but which form part of a final determination of any such appeal) in order that the tax advantage resulting from a tax avoidance transaction shall be withdrawn from or denied to any person concerned.

...

(d) Notwithstanding any other provision of the Acts, where—

(i) pursuant to subsection (4)(c), the Revenue Commissioners determine the tax consequences which they consider would arise in respect of a transaction if their opinion that the transaction is a tax avoidance transaction were to become final and conclusive, and

(ii) pursuant to that determination, they specify or describe in a notice of opinion any adjustment or act which they consider would be, or be part of, those tax consequences,

then, in so far as any right of appeal lay under subsection (7) against any such adjustment or act so specified or described, no right or further right of appeal shall lie under the Acts against that adjustment or act when it is made or done in accordance with this subsection, or against any adjustment or act so made or done that is not so specified or described in the notice of opinion but which forms part of the final determination of any appeal made under subsection (7) against any matter specified or described in the notice of opinion.

37. The appeal referenced in s. 811(5) is set out in s. 811(7) of the TCA 1997. As currently framed, s. 811(7) provides:

Any person aggrieved by an opinion formed or, in so far as it refers to the person, a calculation or determination made by the Revenue Commissioners pursuant to subsection (4) may appeal the opinion to the Appeal Commissioners, in accordance with section 949I, within the period of 30 days after the date of the notice of that opinion on the grounds and, notwithstanding any other provision of the Acts, only on the grounds that, having regard to all of the circumstances, including any fact or matter which was not known to the Revenue Commissioners when they formed their opinion or made their calculation or determination, and to this section—

(a) the transaction specified or described in the notice of opinion is not a tax avoidance transaction,

(b) the amount of the tax advantage or the part of the tax advantage, specified or described in the notice of opinion which would be withdrawn from or denied to the person is incorrect,

(c) the tax consequences specified or described in the notice of opinion, or such part of those consequences as shall be specified or described by the appellant in the notice of appeal, would not be just and reasonable in order to withdraw or to deny the tax advantage or part of the tax advantage specified or described in the notice of opinion…

38. As discussed below, Revenue claims that s. 811(5)(d) precludes any appeal other than that provided for in s. 811(7). The appellant doesn't dispute that he has exhausted his right of appeal under s. 811(7) but contends that his right of appeal under s. 955(2) (and s. 956(2)) of the Act is not excluded by s. 811(5)(d). He cites the decision of the High Court (Laffoy J) in *Revenue Commissioners v Droog* [2011] IEHC 142 in support of the proposition that s. 955, as he puts it, has "*primacy over*", or "*trumps*", s. 811. Revenue argues that the Supreme Court decision in that case ([2016] IESC 55) supports its argument that s. 811(7) disapplies any other right of appeal provided under the TCA 1997, including those in ss. 955 and 956. That is the first issue in dispute between the parties.

39. In addition, Revenue relies on s. 811(5A) of the TCA 1997. This provision was introduced by an amendment contained in s. 130 of the Finance Act 2012. It provides:

(5A) (a) In this subsection—

'assessment' includes a first assessment, an additional assessment, an additional first assessment and an estimate or estimation;
'amendment', in relation to an assessment, includes the adjustment, alteration or correction of the assessment.

(b) Where the opinion of the Revenue Commissioners, that a transaction is a tax avoidance transaction, becomes final and conclusive, then for the purposes of giving effect to this section, any time limit provided for by Part 41 or 41A, or by any other provision of the Acts, on the making or amendment of an assessment or on the requirement or liability of a person to pay tax or to pay additional tax—
(i) shall not apply, and
(ii) shall not affect the collection and recovery of any amount of tax or additional tax that becomes due and payable."

(2) (a) Subsection (1) applies to any assessment to tax or any amendment of any assessment to tax which is made, on or after 28 February 2012, so that the tax advantage resulting from a tax avoidance transaction, in respect of which a notice of opinion has become final and conclusive, is withdrawn from or denied to any person concerned.

40. Revenue argues that even if there were a right of appeal under s. 955(2) or s. 956(2), *i.e*., even if it weren't excluded by s. 811(5)(d), it would be excluded by s. 811(5A). Any appeal under s. 955(2) or s. 956(2) is confined to a complaint that the amended assessment, in the case of s. 955, or the further enquiry, in the case of s. 956, was made outside the four-year time limit. If the time limit is disapplied, then necessarily any entitlement to appeal falls away.

41. The appellant doesn't dispute that s. 811(5A) disapplies the time limits in ss. 955 and 956, but argues that it does not operate retrospectively such as to disapply the time limits in his case. If it does so operate, he argues that the provision must be unconstitutional. He relies on Article 15.5.1° of the Constitution:

The Oireachtas shall not declare acts to be infringements of the law which were not so at the date of their commission.

42. Revenue contends that the legislation clearly applies to the appellant's position, *i.e.*, it applies notwithstanding that the transaction and the Notice of Opinion pre-dated the coming into operation of s. 811(5A). It also argues that it is impermissible for the appellant to seek to challenge the constitutionality of the legislation by way of case stated from a decision of the TAC. Revenue relies on the decision of the Court of Appeal in *Hanrahan v Revenue Commissioners* [2024] IECA 113 as having expressly determined these issues. Mr Falkenthal argues that the Court of Appeal decision is not binding as its conclusions in relation to s. 811(5A) were clearly *obiter*. The applicability of s. 811(5A) is the second issue of dispute between the parties.

43. Finally, Revenue relies on s. 957(1)(c) of the TCA 1997. This provides:

> *(1) No appeal may be made against—*
> …
> *(c) the amount of any income, profits or gains or, as respects capital gains tax, chargeable gains, or the amount of any allowance, deduction or relief specified in an assessment or an amended assessment made on a chargeable person for a chargeable period, where that amount had been agreed between the inspector and the chargeable person, or any person authorised by the chargeable person in that behalf, before the making of the assessment or the amendment of the assessment, as the case may be.*

44. Revenue argues that the Settlement represents an agreement on an amount for the purpose of this section and that, accordingly, no appeal arises. No argument was advanced at the hearing of the case stated on the appellant's behalf regarding the applicability of s. 957(1)(c), however it is addressed in his written submissions.

45. In those submissions, the appellant contends that he could not be said to have agreed the amount in the amended assessment since the Settlement did not reference any amount, and, in addition, the amended assessment referenced a different sum than that set out in the Notice of Opinion and the Demand Letter. It should be noted that it was suggested on the appellant's behalf at the hearing of the case stated that the Notice of Opinion did not contain reference to any amount. It was further stated that the appellant did not have a copy of the Notice of Opinion despite requesting it. The Notice was not contained in the papers

furnished to the court but, by agreement of the parties, it was provided by Revenue during the course of the hearing. As recorded above in the opening paragraph, the suggestion that it did not contain references to any amount was clearly incorrect. Moreover, it is clear from the content of the appellant's written submissions (both before Commissioner O'Callaghan and this court) that he was aware that it specified an amount.

46. In addition to arguing that there was no agreement on an amount within the meaning of s. 957(1)(c), the appellant argued that he was appealing against the entitlement to raise an assessment at all, rather than against the amount in the assessment and, accordingly, the sub-section did not apply.

Relevant case law

47. The underlying facts in *Revenue Commissioners v Droog*, a case relied on by both parties, are similar to those at issue in this case stated. In 1998, the taxpayer had claimed tax relief for the tax year 1996/1997 on foot of a transaction, being his investment in a partnership concerned with the acquisition, distribution and licensing of films. Revenue formed the opinion that this was a tax avoidance transaction within the meaning of s. 811 of the Taxes Consolidation Act 1997 and served notice on the taxpayer to that effect, in similar terms to the Notice of Opinion the subject of this case stated. However, in *Droog*, the Notice was served in 2007, some nine years after the taxpayer made his return and the relief was granted. The taxpayer appealed under s. 811(7) and at issue in the appeal was whether the four-year time limits in ss. 955 and 956 of the TCA 1997 applied to Revenue's entitlement to form an opinion that a particular transaction was a tax avoidance transaction under s. 811. The Appeal Commissioners concluded that the time limit did apply and a case was stated to the High Court at the request of Revenue.

48. Ss. 955 and 956 are contained in Part 41 of the TCA 1997. That part contains its own interpretation section, s. 950, which includes the following at s. 950(2):

> *(2) Except in so far as otherwise expressly provided, this Part shall apply notwithstanding any other provision of the Tax Acts or the Capital Gains Tax Acts.*

49. Thus, the four-year time limits in ss. 955 and 956 applied to the forming of an opinion under s. 811 unless "*otherwise expressly provided*" under that section. Revenue argued that the reference to "*at any time*" in s. 811(4), and the clause "*notwithstanding any other provision of the Acts*" in s. 811(5)(a), constituted just such express provision. The High Court did not accept that this was so and agreed that the Appeals Commissioner was correct in concluding that the four-year time limits in ss. 955 and 956 applied to the forming of an opinion under s. 811. The Supreme Court (Clarke J, as he then was) agreed with the High Court's interpretation:

> "*7.1 On one view the question comes down to a very net one. Part 41, by virtue of s.950(2), is stated to override any other provision of the Tax Acts or the Capital Gains Tax Acts "except insofar as otherwise expressly provided". Section 811(4) TCA says that Revenue may form the relevant opinion for the purposes of the section "at any time". The question is as to whether that later provision, specifying that the opinion may be formed "at any time", is a sufficient express exclusion of the operation of the time limits contained in Part 41 to meet the requirement in s.950(2) that there be an express contrary provision.*
>
> *7.2 There was some debate at the hearing as to whether there could be an express contrary provision which did not actually mention Part 41 or any specific provision of same such as ss.955 and 956. It does not appear to me that there is an absolute requirement that there be a specific mention of the fact that Part 41 or any aspect of it is being expressly disapplied once the language of the relevant other aspect of the Taxes Acts is sufficiently clear to make it obvious that a particular provision of Part 41 is being disapplied.*
>
> *...*
>
> *7.5 Another suggestion from Revenue drew attention to the fact that the liability to pay any sums which may become due as a result of an initial opinion under section 811 does not crystallise until such time as the appellate process has been completed. It is pointed out, and the courts are painfully aware of the fact, that the taxation appellate process frequently takes a very great deal of time. Indeed, this case itself is by no means a bad example although it is far from the worst case which the courts have encountered. On that basis it is said that it could not have been intended by the Oireachtas that s.955*

would apply to a section 811 opinion because there would have been a very great risk that a section 811 opinion (even if speedily given) would not become final and conclusive, thus giving rise to an obligation to make a payment, within the four year period having regard to the appeals which the legislation allows.

…

7.7 The practical consequences are, indeed, as counsel for Revenue suggested. There may very well be a problem. But it does not seem to me that that problem can legitimately lead to construing the legislation in a way which its wording does not allow. If the proper construction of the Taxes Acts leads to section 811 being governed by the time limits in Part 41 then the answer to that problem would have been to make an express provision in section 811 which stopped time running, for the purposes of s.955, as soon as notice of the relevant opinion was given. Such a regime could not be criticised in any way as being unfair for the tax payer would know that his or her affairs for the relevant tax year were under challenge, notwithstanding a fully compliant return, within the four year period. It seems to me to follow that the fact that there might be practical difficulties, which could have been capable of another solution, could not alter the proper construction of the legislation if it is not possible to say that section 811(4) expressly disapplies the time limit contained in Part 41.

7.8 For all of those reasons it seems to me that the issue does indeed come down to a very net one.

…

7.10 In my view, the use of the phrase "as otherwise expressly provided" in s.950(2) requires that any dis-application of the provisions of Part 41 must be in clear and unambiguous language. It is important to recognise that s.950 does not merely require that it be "otherwise provided" but goes on to require that any such provision must be express. It certainly follows that there cannot be an implied exclusion of the effect of Part 41. Likewise it seems to me that an unclear or potentially ambiguous or debatable potential dis-application provision could not meet the requirement that it be stated in express terms. That leads to the question of whether the use of the phrase "at any time" in section 811 can meet that test.

…

7.14 But just as the phrase "at any time", when used in respect of re-opening assessments in s.955, can be and is overridden by the time limits contained in Part 41 there is no reason why the identical phrase "at any time", as used in section 811, cannot similarly be overridden by the time limits in Part 41. It is true that, unlike s.950, section 811 does not contain an express stipulation that it is subject to those time limits. However, the very fact that those time limits require to be expressly dis-applied in order for them not to apply means that it was not necessary (because of s.950) that there be an express provision in section 811 dis-applying those time limits. Rather there was required to be an express provision in section 811 dis-applying Part 41 or the time limits contained in it. It does not seem to me, therefore, that the phrase "at any time" amounts to the sort of clear and unambiguous dis-application of the Part 41 time limits that s.950 requires.

...

9.1 As the only purpose of the raising of an opinion under section 811 in this case would be to require Mr. Droog to pay additional tax and as the obligation to pay any additional tax which might become payable as a result of the Nominated Officer's opinion becoming final and conclusive would necessarily arise outside the four year time limit, the commencement of that process by the raising of the opinion in question can have no lawful objective. It must, therefore, itself be regarded as being legally impermissible."

50. The appellant argues that *Droog* is authority for the proposition that s. 950 of the TCA 1997 – and therefore the time limits in ss. 955 and 956 – trump s. 811 and that, just as the time limits apply to the forming of an opinion under s. 811, notwithstanding the reference in ss. 811(4) and 811(5)(a), the right of appeal in ss. 955(3) and 956(2) also subsist notwithstanding anything to the contrary in s. 811(5)(d).

51. Revenue, however, argues that right of appeal has been expressly excluded by "*clear and unambiguous*" language, just as Clarke J indicated was required in *Droog*. It contends that s. 811(5)(d) is sufficiently clear that the rights of appeal in Part 41 are "*otherwise expressly provided*" within the meaning of s. 950(2).

52. In addition, as noted above, Revenue relies on s. 811(5A) of the TCA 1997. It is clear that the section was introduced long after the transaction the subject matter of these proceedings, and indeed, after Revenue issued the Notice of Opinion. The appellant argues that the section cannot apply to him as that would give it retrospective effect, contrary to the presumption against retrospectivity. If the section must be read as having retrospective effect, then he argues that it is unconstitutional. Both these arguments were addressed by the Court of Appeal in *Hanrahan v Revenue Commissioners* [2024] IECA 113.

53. *Hanrahan* involved an appeal from the decision of the High Court ([2022 IEHC 43). The High Court (Stack J) was asked to consider a number of questions in a case stated arising from an opinion formed for the purpose of s. 811 of the TCA 1997. Revenue had issued a notice of amended assessment in circumstances where the opinion had become final and conclusive and the taxpayer had argued that, in light of *Droog*, the assessment had been issued outside the time limit permitted by s. 955(2). Revenue made three arguments in response. First, it contended that unlike *Droog*, the opinion had issued within time and, therefore, *Droog* could be distinguished. The High Court rejected that argument. Second, Revenue argued that the time limits were disapplied in circumstances where the taxpayer had not made a full and true disclosure of all material facts as required by s. 955(2). And third, it argued that the time limits were expressly disapplied by the provisions of s. 811(5A) of the TCA 1997.

54. There were two tax returns at issue, and the High Court found that there had been full and true disclosure in relation to one of the returns, and accordingly the time limits were not disapplied by reason of any failure in that regard. It was, therefore, necessary for the High Court to consider whether section 811(5A) disapplied the time limits in respect of that tax return. The taxpayer relied on the presumption against retrospective legislation and the presumption of constitutionality.

55. The High Court concluded that there was no ambiguity in the legislative provision and, therefore, nothing to which the presumption against retrospectivity could apply in order to read the legislation as having prospective effect only. The court noted that the presumption of constitutionality cannot operate to disapply an unambiguous provision and that it was not open to the taxpayer to challenge the constitutionality of unambiguous legislation in a case stated.

56. In light of the High Court's conclusions, in that appeal, the court had to consider*, inter alia*, whether the four-year time limit in s. 955(2) applied to an assessment issued on foot of an opinion formed under s. 811. The Court of Appeal disagreed with the High Court's conclusion that the taxpayer had made a full and true disclosure in one of his returns. Accordingly, the court concluded (at para. 56) that this disposed of the time issue in full. It did not, therefore, unlike the High Court, need to consider the applicability of s. 811(5A). However, it went on to "*briefly*" address the application of that section. On that issue, it agreed with the High Court.

57. Notwithstanding the court's own description of its assessment being brief, it considered the application of s. 811(5A) in detail. It noted Revenue's argument that *Droog* could be distinguished:

> "***60***. *Revenue also sought to distinguish Droog on the basis that the Notice of Opinion in Droog had been issued many years outside the 4 year period whereas here the Notice of Opinion was formed within the 4 year period (albeit so close to the end of that period as regards 2004 that an assessment on foot of it could never have issued within time). In our view it is significant that s. 811(5A) expressly disapplies the time limit that would otherwise be applicable to the making or amendment of an assessment in respect of a tax avoidance transaction and the recovery of tax on foot of such assessment. The reason that the Supreme Court in Droog held that the raising of a Notice of Opinion outside the 4 year time period was impermissible was because the only object of such opinion would be to require the payment of additional tax in circumstances where the collection of such tax was prevented by the time limits in s. 955(2). As that time limit is now expressly disapplied by s. 811(5A) it would seem to follow that the rationale for holding that a Notice of Opinion which could only become final and conclusive outside the relevant time limit was impermissible is no longer operative. Consequently, arguments as to when the Notice of Opinion might be said to become final and conclusive are of little relevance if, properly construed, s. 811(5A) allows the raising of an assessment and the payment of tax unconstrained by s. 955(2).*"

58. Turning to the question of s. 811(5A)'s retrospective effect, the court concluded as follows:

"***66***. *We agree with Revenue that the clear legislative intent behind s. 811(5A) of the TCA and s. 130(2) of the Finance Act 2012 Act was to enable assessments to be made or amended at any time after the enactment of that section, in order to give effect to a s. 811 opinion which had become final and conclusive, regardless of the chargeable period to which the assessment related and regardless of whether that chargeable period pre-dated the enactment of s. 811(5A). Save that the assessment or amended assessment must itself be one made after 28 February 2012, there is no qualification as to the chargeable period for which such assessment may be made and, in particular, no basis for restricting it to chargeable periods post-2012. Whilst there might be some ambiguity as regards whether s. 811(5A) would be operative so as to disapply the time limit if Revenue were seeking to recover tax on foot of the Notice of Opinion directly rather than by way of raising or amending an assessment, we agree with the trial judge that this is simply not in issue in this case.*

67. *In circumstances where the meaning of s. 811(5A) and s. 130(2) are clear and are clearly intended to have retrospective as well as prospective effect, they are not precluded from having that effect by reason of the presumption against retrospective legislation. Equally, absent a constitutional challenge, the presumption of constitutionality cannot avail the taxpayer and operate to disapply what is a clearly unambiguous provision. Consequently, we agree with the trial judge that the Appeal Commissioner was correct in holding that s. 811(5A) applied so as to disapply the time limit contained in s. 955(2) from the Notice of Opinion in this case. However, for reasons explained at the outset of this analysis, we would prefer to decide the issue on the basis that the time limit in s. 955(2) never applied in the first place (and therefore did not need to be disapplied) since the taxpayer had not made a full and true disclosure of all facts material to the assessment of CGT in either 2004 or 2005. As the Notices of Opinion are not statute barred we will now proceed to consider the substantive issue.*"

59. I note, for completeness, that the Supreme Court has refused leave to appeal from the Court of Appeal's decision ([2024] IESCDET 106). The Court of Appeal's conclusions regarding s. 811(5A) don't appear to have been put in issue in that application.

60. Revenue submits that this decision disposes of the issue in the case stated. S. 811(5A) expressly disapplies the time limit in Part 41, and there can, therefore, be no question of an appeal under ss. 955(3) or 956(2). Insofar as the appellant contends that its retrospective effect is unconstitutional, that is an argument he is not entitled to pursue in a case stated, only in a constitutional challenge to the legislation.

61. The appellant argues that it is apparent from the second last sentence of *Hanrahan* quoted above, that the decision of the Court of Appeal was *obiter* on this point and that this court was therefore free to conclude that s. 811(5A) could be interpreted as operating only prospectively in order to avoid any constitutional infirmity, *i.e.*, the court should apply the double construction rule and give the provision a constitutional interpretation. However, he did not suggest any error in the Court of Appeal's analysis, and critically, even when expressly invited to do so, the appellant did not suggest an interpretation of s. 811(5A) which gave it only prospective effect, *i.e.*, was not, as he alleged, unconstitutional. Nor did he proffer any basis for contending that the Court of Appeal had erred in concluding that the provision could not be disapplied absent a constitutional challenge.

Appeal by way of case stated

62. The principles applicable to the determination of a case stated and to the issues of statutory interpretation which arise were not put in issue by either party and are well settled.

63. The proper approach for a court to take in considering a case stated is that set out by Kenny J in *Mara (Inspector of Taxes) v Hummingbird* [1982] ILRM 421 as approved by the Supreme Court in *O'Culachain v McMullan Brothers Ltd* [1995] 2 IR 217 (at pp. 222 -223):

> *"(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."

64. Those principles have been approved more recently in *Byrne v Revenue Commissioners* [2021] IEHC 262, in which Twomey J noted the "*high threshold*" facing an appellant in a case stated, having regard to the curial deference due to the TAC. Twomey J's observations were, in turn, endorsed in *McNamara v Revenue Commissioners* [2023] IEHC 15 by Barr J, though Barr J did sound a note of caution, referencing the observations of Murray J in *Stanberry Investments Ltd v Commissioner of Valuation* [2020] IECA 33 that curial deference depends on a tribunal having provided a properly reasoned decision, and was not a mechanism for compensating where the decision was not so reasoned.

65. The principles applicable to statutory interpretation have been the subject of a number of recent decisions, and accordingly, there was also no dispute between the parties regarding the proper approach to take. A helpful review of the principles is to be found in *Perrigo Pharma International DAC v McNamara and Ors* [2020] IEHC 552, a case concerning the interpretation of provisions of the Taxes Consolidation Act 1997 (see, in particular, paragraph 74).

66. In the more recent Supreme Court decision in *Heather Hill Management Company CLG v An Bord Pleanála* [2022] IESC 43; [2022] ILRM 313, the court (Murray J) again reviewed the relevant authorities. The court emphasised the primacy of the words used in a statute but explained that even plain words should not be interpreted divorced from the context in which they are used.

Discussion

67. In light of the above principles, I propose to consider the case stated by reference to each of the three statutory provisions on which Revenue relies in support of its argument that Commissioner O'Callaghan was correct to refuse the appellant's application to appeal.

Section 811(5)(d) of the TCA 1997

68. Before considering the precise arguments made by reference to s. 811(5)(d), it is worth observing that, at least prior to the amendment introduced by s. 811(5A), s. 811 did not make clear what steps Revenue was required to take in order to recover a tax advantage that had arisen from a tax avoidance transaction. In particular, there was no indication that it was necessary for Revenue to issue an assessment in order to recover any sums which might become due should an opinion that a transaction was a tax avoidance transaction become final and conclusive. As appears from s. 811(5)(a) of the TCA 1997, quoted above at paragraph 36, Revenue appears to have been given broad discretion as to how it would address the effect of any opinion (which has become final and conclusive) that a transaction was a tax avoidance transaction. The sub-section refers to Revenue making "*all such adjustments and do[ing] all such acts as are just and reasonable*" in order that the tax advantage be withdrawn or denied to the taxpayer.

69. In fact, Revenue initially sought to recover the tax advantage by simply making a demand for payment in its Demand Letter dated 10 April 2013 in which it stated that Revenue was "*withdrawing the loss relief claimed in respect of the year 1996/97*" and asked the appellant to remit the additional income tax due. The appellant responded by stating that there was nothing in the Taxes Acts which conferred on Revenue the right to make such a statement or empower such an action. This response was extraordinary for two reasons. First, s. 811, and in particular s. 811(5)(a) of the TCA 1997, the very section which had been at the heart of the appellant's first appeal and case stated, expressly provides just such a power. Second, the appellant had just signed the Settlement pursuant to which he had agreed that the Notice of Opinion, which stated that the tax relief would be withdrawn if the opinion became final and conclusive, should stand.

70. In any event, Revenue *did* issue an assessment, on 29 May 2013, seeking repayment of the loss relief claimed and it is that assessment which is the subject of the disputed appeal. It is worth noting, however, that had Revenue simply pursued the demand instead of issuing an assessment, the issue under s. 955(2) would still arise, as that provision expressly provides that not only should no assessment be made but that no additional tax shall be payable after four years by reason of anything contained in a return, provided of course, that the return contained a full and true disclosure of all relevant matters. As in *Droog* and *Hanrahan*, therefore, it is not necessary to determine whether it was necessary for Revenue to issue the amended assessment that it did.

71. In *Droog*, both the High Court and the Supreme Court concluded that Revenue's power "*at any time*" to form an opinion that a transaction was a tax avoidance transaction could not be read as disapplying the time limits provided for in ss. 955 and 956. The judgment of Clarke J clearly recognises the difficulties that this interpretation could give rise to in circumstances where an appeal process could result in an opinion being formed that a transaction was a tax avoidance transaction well within any four-year time limit, but that opinion only becoming final and conclusive outside that four-year period. That wasn't an issue in *Droog*, where the opinion was only formed nine years after the relief was claimed, but it does arise in this case, where the opinion was formed well within any applicable time limit, but the appeal procedures availed of by the taxpayer meant that it did not become final and conclusive until many years later. In *Hanrahan*, the High Court rejected a similar point of difference as a basis for distinguishing *Droog*.

72. However, the issue in this case stated is different from the issue in *Droog*. In that case, the question was whether the *time limits* contained in ss. 955 and 956 of the TCA 1997 were disapplied by the wording of section 811 of the TCA 1997. In this case, however, the question is whether the *rights of appeal* provided for in ss. 955(3) and 956(2) are disapplied by the wording of s. 811 and, in particular, the wording of s. 811(5)(d).

73. As is clear from the decision in *Droog*, the potential consequences of a conclusion that a further right of appeal arises*, i.e.*, that an entitlement to recover relief claimed on foot of a tax avoidance transaction could become time-barred during the course of such a further appeal, does not determine the interpretation of the Act. The only question is whether the

right of appeal set out in ss. 955 and 956 has been excluded in sufficiently clear and unambiguous language in s. 811(5)(d).

74. In my view, it has. S. 950(2) provides that Part 41 of the Act, which includes the rights of appeal at issue here, will apply notwithstanding any other provision of the Act "*except insofar as otherwise expressly provided*". The terms of s. 811(5)(d) operate as just such express provision. The use of the phrase "*notwithstanding any other provision of the Acts*", in light of *Droog*, would not, by itself, constitute sufficiently clear and unambiguous language to disapply Part 41. However, the express language thereafter, that, other than the appeal which lay under s. 811(7), there would be no "*right or further right of appeal under the Acts*", could not be clearer without expressly referencing Part 41. As made clear in *Droog*, express reference to Part 41 was not a prerequisite and was not required here. In *Droog*, the court was able to interpret the expression "*at any time*" in s. 811(4) as meaning, in effect, "at any time *within the time limits provided for in Part 41*." There is a great deal of difference between that holistic interpretation of s. 811(4) and an interpretation of s. 811(5)(d) which, as effectively contended for by Mr Falkenthal, requires it to be read as "no right or further right of appeal *other than the rights of appeal contained in Part 41*".

75. There is nothing unfair about such an interpretation. In *Droog*, the taxpayer successfully relied on the time limits in Part 41 in his appeal under s. 811(7) and they could have been relied on by the appellant in this case. There is no reason why the legislation should be interpreted as providing a further opportunity for him to do so.

76. In the circumstances, Commissioner O'Callaghan was correct to conclude that the appellant had no further right of appeal having exhausted his appeal under s. 811(7).

Section 811(5A) of the TCA 1997

77. Whatever doubt there may have been about whether s. 811(5)(d) was sufficient to disapply the rights of appeal in ss. 955 and 956 has, in any event, been rendered irrelevant by the introduction of s. 811(5A), which disapplies the time limits contained in those provisions to any assessment raised on foot of an opinion formed under s. 811 which has

become final and conclusive, where that assessment is raised after 28 February 2012. Given the timing of the amendment to s. 811, following the High Court judgment in *Droog*, it is reasonable to suppose that s. 811(5A) was introduced by the Oireachtas to address the consequences of that court's decision.

78. In *Hanrahan*, the High Court and Court of Appeal both concluded that the section was unambiguous, at least in a case just as here, where Revenue was seeking to recover on foot of an assessment. They also both concluded that it was not open to the taxpayer to challenge the constitutionality of an unambiguous provision in a case stated, rather it would have to be challenged in separate proceedings, a constitutional challenge to the legislation.

79. I would, of course, be bound by the Court of Appeal decision save that the appellant points out, correctly, insofar as it goes, that the Court of Appeal's conclusions on this issue were *obiter*. However, the Court's *obiter* comments, fully considered on the basis of an issue which was fully argued, clearly have significant persuasive force and it would require something compelling to prompt this court to reach any different conclusion. That is particularly so where the Court of Appeal's conclusions were precisely the same on this issue as those of the High Court. In that court, because of different conclusions on another issue, the court's decision on this point could not be described as *obiter*.

80. Far from offering anything compelling, the appellant suggests no alternative interpretation of s. 811(5A) to that found by both courts in *Hanrahan*, not identifying any ambiguity in the section or contending for any error in those judgments. On the assumption that, as in *Hanrahan*, the appellant was seeking to rely on the presumption of constitutionality and therefore contending for a different, and on his case constitutional, interpretation of s. 811(5A), the appellant was expressly invited to identify such an alternative interpretation. However, he was unable to do so.

81. In the circumstances, I have no hesitation in adopting the interpretation of s. 811(5A) identified in *Hanrahan*, or the conclusion that it was not permissible to challenge the constitutionality of the section in this type of proceeding. It is not necessary, therefore, for me to deal with the appellant's argument that the section infringes Article 15.5.1° of the Constitution save to record Revenue's observation that s. 811(5A) does not purport to declare anything to be an infringement of the law.

82. In the circumstances, Commissioner O'Callaghan was also correct in concluding that the appellant had no further right of appeal under ss. 955(3) and 956(2) in circumstances where the time limits in ss. 955(2) and 956(1) had been disapplied by s. 811(5A) of the TCA 1997.

Section 957(1)(c) of the TCA 1997

83. In light of the above conclusions, it is not necessary for me to consider the final issue, whether the Commissioner was correct in concluding that any right of appeal against the amount contained in the notice of amended assessment had been excluded by s. 957(1) of the TCA 1997 on the grounds that the appellant had, by the Settlement, previously agreed the amount of relief withdrawn in the assessment. Furthermore, there was limited argument on this question during the course of the hearing. The appellant made no argument on this issue at the hearing of the case stated. Revenue was not, therefore, required to engage with it in any detail. However, since it formed part of Commissioner O'Callaghan's reasons for rejecting the appellant's entitlement to appeal, I will address the issue briefly.

84. Revenue argues that the Settlement represents the necessary prior agreement on an amount for the purpose of s. 957(1), thus disentitling any appeal by the appellant.

85. In the appellant's legal submissions, it was contended that as the Settlement did not refer to any figure, there was no prior agreement on the amount in the assessment for the purpose of s. 957(1)(c).

86. In my view, Commissioner O'Callaghan correctly rejected this argument. The terms of the Settlement must be understood in context. By the Settlement, Mr Falkenthal expressly agreed to be bound by the decision of the Circuit Court. That can only be understood as an agreement to be bound by Judge Matthews' decision that the opinion in the Notice should stand. Contrary to the appellant's contention otherwise, the Notice of Opinion specified an amount of tax relief to be withdrawn. The only sensible interpretation of the Settlement was that it constituted a prior agreement by the appellant that the amount of relief specified in

the Notice of Opinion would be withdrawn, and he would, therefore, become liable to repay same.

87. The appellant also sought to argue that as the assessment included a *lower* amount than that set out in the Notice of Opinion, there had been no agreement on that lower figure for the purpose of s. 957(1)(c). I do not see any merit in such an argument. The disapplication of the right of appeal in the event that an assessment sought payment of an amount previously agreed would clearly operate to disapply the right of appeal in respect of any assessment seeking payment of some lesser amount. In this respect, I also agree with Commissioner O'Callaghan.

88. However, it seems to me that s. 957(1)(c) does not operate to disapply the right of appeal *simpliciter*. The wording of the section is that that there shall be no appeal against "*an amount… specified in an assessment*". However, as the appellant's submissions point out, he was seeking to appeal against the entitlement of Revenue to raise an amended assessment at all, pursuant to s. 955(3). That was not an appeal against any amount specified in the assessment and, therefore, an appeal does not appear to be expressly excluded by s. 957(1)(c).

89. That does not, of course, mean that, by the Settlement, the appellant had not agreed to be bound by the Notice of Opinion, *i.e.*, that he had agreed not to exercise any further right of appeal to which he might otherwise be entitled. However, that is not a question which arises in the case stated.

90. The foregoing, of course, makes no difference to my overall conclusions that Commissioner O'Callaghan was correct to reject the appellant's appeal. In circumstances where there was limited argument on this issue before this court, it is perhaps an issue which might merit further analysis in a case where its resolution might be determinative.

Conclusion

91. The answer to the question posed in the case stated is as follows:

Did Commissioner O'Callaghan err in law in upholding the decision of the Respondent to refuse the Appellant's appeal?

NO