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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL BY CASE STATED FROM THE LANDS TRIBUNAL FOR NORTHERN IRELAND

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BETWEEN:

JAMES P COREY TRANSPORT LIMITED AND OWEN JACOBSON

Appellants;

and

BELFAST HARBOUR COMMISSIONERS

Respondent.

_____

Before: McCloskey LJ, Maguire LJ and McFarland J

_____

McCLOSKEY LJ (delivering the judgment of the Court)

Introduction

[1] On the second of two successive listings (26 November 2020 and 13 January 2021) and having heard the parties' respective counsel on both occasions, the court enunciated its decision to determine these combined appeals by case stated by the mechanism of full remittal to the Lands Tribunal for the purpose of *de novo* hearing and determination, in the exercise of its power under section 38(1)(f) of the Judicature (NI) Act 1978. In what follows we set out our reasons for so deciding.

[2] This judgment has the following appendices:

(a) Appendix 1: The order of this court dated 26 November 2020.

(b) Appendix 2: Transcript of this court's decision and ruling on the same date.

The Underlying Proceedings

[3] Corey Transport Limited and Owen Jacobson ("*the appellants*") are commercial operators. Both occupied and carried on certain business operations upon and from separate sites within the Belfast Harbour Estate owned by the Belfast Harbour Commissioners ("*the respondent*"). The first appellant is in the business of road haulage and the second manufactures modular buildings. It appears that they carry out their respective businesses exclusively from the disputed premises. Their occupation and use of the two different sites dates from circa 2005/2007.

[4] In 2018 the parties found themselves in dispute, triggered by the respondent's service of notices to quit stimulated by a plan to execute certain port redevelopment works. Both appellants refused to vacate their respective premises. On 4 June 2019 they initiated legal proceedings against the respondent by filing tenancy applications under the business tenancies legislation with the Lands Tribunal ("*the Tribunal*").

[5] While the evidence before this court does not include any initial directions or orders of the Tribunal, it is evident from the papers that the Tribunal directed a hearing on the preliminary issue of whether the appellants were tenants or licensees of the respondent. This stimulated a joint statement of case on behalf of the appellants and a replying statement of case on behalf of the respondent. Next there was a hearing before the Tribunal. Evidence was given by each of the appellants and by a director of the respondent. The parties were represented by counsel and the Tribunal received submissions. The proceedings, from their inception, were conducted by the professional member of the Tribunal. The decision of the Tribunal was evidently reserved. The observation that the proceedings were conducted and completed with commendable expedition is appropriate.

[6] By its written decision dated 18 February 2020 the Tribunal determined, at [47]:

> "*The Tribunal …… finds both applicants to be licensees and on that basis their Tenancy Applications are dismissed.*"

The Tribunal's formal order, which is dated 18 May 2020 in both cases dismissed each of the appellant's tenancy applications and ordered that they pay the respondent's costs to be taxed in default of agreement.

The Two Cases Stated

[7] Next, in both cases the Tribunal was requested by the appellants to state a case for the opinion of the Court of Appeal. The procedure adopted in each case was the same. The appellants' solicitors lodged with the Tribunal a document entitled "*Case Stated by the Lands Tribunal*", in the following terms:

"*On 18 May 2020 the Tribunal made an order determining that the Appellant was a licensee and not a tenant of premises at ……*

The Applicant/Appellant applied to me by requisition dated 18 June 2020 under Rule 23 of the Lands Tribunal (NI) Rules 1994 to state a case for the opinion of Her Majesty's Court of Appeal on the points of law therein specified ……..

The questions for the determination of the Court of Appeal are:

1. *Was I correct in finding that the Appellant occupied the said premises under a written agreement made in 1995?*

2. *Was I correct in finding that the Appellant occupied the said premises as a licensee and not a tenant?*

Signed: ……..

Dated this day of 2020"

[8] The professional member acceded to both requisitions. His methodology was to sign, date and issue the two draft documents lodged with the Tribunal in the terms aforesaid. In this way, in each of the two cases the signed and dated document became the "case stated" filed with this court.

[9] As noted in [1] above both cases were listed together for hearing before this court, initially on 26 November 2020. This first listing was not preceded by any case management or preliminary listing. It was, rather, a purely paper exercise carried out in accordance with the "Covid-19 pandemic" arrangements and procedures promoted by the Lord Chief Justice from May 2020 and reflected in Practice Direction 01/2020. The course and outcome of the hearing before this court on 26 November 2020 are readily ascertained from the order made (Appendix 1) and the transcript of our decision and ruling (Appendix 2). In short, this court ruled that it did not have before it in either appeal a properly formulated case stated and gave effect to this ruling by exercising its power of remittal under section 38(1)(f) of the Judicature Act. As appears from its order, this course was taken "*… for the purpose of restating the case stated …..*" and, to this end, certain procedural directions involving the parties were incorporated. This was a remittal of a limited species.

[10] Some six weeks later the Tribunal transmitted to this court a reformulated case stated in each of the appeals. As these are in virtually identical terms it suffices to reproduce one at this juncture:

[COREY TRANSPORT LTD]

Case stated by Mr Henry M Spence, MRICS Dip Rating IRRV (Hons) of the Lands Tribunal in Northern Ireland following his dismissal of a tenancy application by the Appellant, by way of a written decision dated 18 May 2020.

Background

1. The appellant occupies premises at Stormont Road within the Belfast Harbour Estate.

2. On the 22 October 2018, the respondent served a notice to quit on the appellant. On the same date, the respondent also served, on a without prejudice basis, a landlords notice to determine the tenancy under Article 6 of the Business Tenancies (Northern Ireland) Order 1996 ("the 1996 Order").

3. On the 4 June 2019, the appellant submitted a tenancy application to the Lands Tribunal under Article 10 of the 1996 Order, requesting a new tenancy of the premises at Stormont Road.

4. Following a mention of the reference the parties agreed and the Tribunal directed that there should be a preliminary hearing on the question of whether the appellant occupied its premises as a tenant or a licensee. The case was heard on the 21 November 2019.

5. There was no written agreement between the parties which specifically named the premises at Stormont Road. Written terms for the appellants' occupation of the Stormont Road premises had been proposed by the respondent and forwarded to the appellant. These were never signed or returned by the appellant and were never executed.

6. The appellant had moved to the Stormont Road premises on the basis of a previous 1995 agreement between the parties which permitted it to occupy an "open storage area" within the Harbour Estate but the agreement did not name any specific storage area. At the time the appellant moved to the Stormont Road premises it comprised a disused car park which had been fenced in.

7. In the absence of any other agreement the Tribunal found the appellant to be bound by the terms of the 1995 agreement. The Tribunal also found that this agreement constituted a licence rather than a lease.

8. Accordingly, as set out at paragraph 4 of its decision, the Tribunal determined that the appellant was a licensee and not a tenant and dismissed the appellants tenancy application.

Questions

9. The questions for determination by the Court of Appeal are:

(i) Did the Tribunal err in law and reach a decision that no reasonable Lands Tribunal would have reached in deciding that the appellant occupied the premises at Stormont Road under the terms of the 1995 Agreement?

(ii) Did the Tribunal err in law in determining that the 1995 agreement is a license rather than a lease?

(iii) In all the circumstances did the Tribunal err in law and reach a decision that no reasonable Lands Tribunal could have reached in deciding that the appellant was a licensee rather than a tenant?

Signed
Mr Henry M Spence MRICS Dip Rating IRRV (Hons)
Lands Tribunal Member for Northern Ireland
Made this day of December 2020

[11] The next material development was the relisting of the appeals before this court on 13 January 2021.

Cases Stated: Form and Content

[12] An appeal by case stated to the Court of Appeal (sometimes to the High Court) from the decision of a court or tribunal occupying a lower position in the hierarchical arrangements of the Northern Ireland legal system is a long established means of appellate challenge. It is a mechanism with specific and distinctive characteristics which distinguish it from other appellate mechanisms such as an appeal on the merits, an appeal by way of rehearing or an appeal on a point of law (to which it is closely related). An appeal by case stated to the Court of Appeal is normally available only were made possible by primary legislation.

[13] Continuing at the general level, an appeal by case stated entails a process beginning with a request (or "requisition") by the dissatisfied party to the lower court or tribunal concerned to state a case for the opinion of the Court of Appeal. This exercise is normally governed by the procedural rules (in subordinate legislation) of the court or tribunal concerned which, typically, specify time limits and sometimes other related steps and matters. These procedural rules normally require the applicant to formulate precisely the question/s of law which the court or tribunal is being requested to state for the decision of the Court of Appeal. In this way a requisition to state a case is normally framed in relatively lean terms.

[14] Continuing this general overview, the powers of the court or tribunal concerned upon receipt of a requisition to state a case are normally specified in the relevant measure of primary legislation. In every case it will be necessary to check carefully the corresponding provisions of subordinate legislation, normally found in the applicable procedural rules regime. The options typically available to the court or tribunal are to accede to the requisition in full, to accede to it in part or to refuse it. In certain contexts the procedure to be applied by the court or tribunal in this exercise may not be comprehensively specified in primary or subordinate legislation, in which case the court or tribunal should give consideration to devising procedural mechanisms such as inviting a revised formulation of the questions of law, requiring written submissions from both parties and convening an *inter-partes* listing.

[15] The form and content of every case stated are a matter of crucial importance. Typically they are not regulated by either primary or subordinate legislation. Rather it is necessary in every case for the court or tribunal concerned to have recourse to the guidance contained in a series of decisions of this court. There is simply no substitute for this exercise in the Northern Ireland legal system. This will remain so unless and until the case stated appellate mechanism is abolished or replaced. This court, mindful of the challenges which this poses to lower courts and tribunals, takes this opportunity to rehearse the guiding principles and requirements.

[16] Alertness to the indispensable ingredients of a valid case stated is a discipline which every lower court and tribunal should find helpful at every stage of the proceedings before them. The formulation of every case stated must be preceded by a decision in which clear, concise and material findings of fact is a matter of paramount importance. Irrespective of whether the decision of the court or tribunal was given in writing or orally or perhaps a combination of both, every judicial authority, upon receipt of a requisition to state a case, must focus intensely on the following question: what were my findings of fact? The importance of this exercise cannot be over-emphasised.

[17] There are several variables, each potentially overlapping:

(a) The material facts might have been agreed between the parties.

(b) The material facts might be a mixture of facts agreed between the parties and facts found by the judicial authority concerned.

(c) The material facts might include undisputed matters of a factual nature which the judicial authority adopts expressly as findings of fact.

(d) The judicial authority's findings of fact might have elements of some or all of the foregoing.

(e) The judicial authority's findings of material fact might have none of the foregoing.

[18] The indelible rule in play is that every case stated must set out fully, clearly and concisely the judicial authority's findings of material fact. Virtually every case stated – properly – ends with a short section in terms such as "*The question/s of law for the opinion of the Court of Appeal is/are ……. (a) …. (b) ….*" another essential component of every case stated. The formulation of a question of law must be preceded by the exercise of setting out in clear, concise and comprehensive terms the findings of material fact of the court or tribunal concerned. The formulation of consequential questions of law cannot sensibly or properly be undertaken otherwise.

[19] The court or tribunal upon receipt of a requisition must also bear in mind that it is not engaged in an exercise of stating "*questions*" for the opinion of the Court of Appeal. In this respect, in the instant case both the requisition to the Tribunal to state a case and the ensuing case stated contained the inappropriate terminology of "*the **questions** for the determination of the Court of Appeal are ….*" By the appellate mechanism of a case stated the Court of Appeal determines questions of law only. Self-evidently, the question/s of law formulated must arise out of the findings of material fact and consequential legal conclusions.

[20] The guidance to be derived from previous decisions of this court includes the following. It is not enough to state the issue as "whether the court was correct in law in deciding that ...": *R (Townsend)* v *McKee* [1982] 17 NIJB at 6-8. If the application is delivered in time, the Court of Appeal can hear the appeal though the point of law has not been properly stated, but it should be cured by amendment to insert a proper statement of the point of law, within a reasonable time: *R* v *Bromley Mag Ct ex p Waitrose* [1980] 3 All ER 464; or at any time before the appeal hearing: *Robinson* v *Whittle* [1980] 3 All ER 459. Each paragraph should deal with a single portion of the subject-matter: firstly the facts and inferred facts, then the contentions of each party, then the judge's findings, and finally the precise point of law: *Emerson* v *Hearty* [1946] NI 35. All these matters should be entirely contained in the text of the case stated itself, not in any annexed document: *Michelstown Co-op* v *Commr for Valuation* [1989] IR 210. The duty to state the findings of fact is not met by merely appending the judge's written judgment: *DOE v Fair Employment Agency* [1989] NI 149 at 158F or by a recital or annexation of a transcript of evidence which the judge says he accepted as true; "evidence remains evidence even where it has been accepted": *Michelstown Co-op* v *Commr for Valuation* [1989] IR 210. Authorities cited in argument before the judge should be listed.

[21] The case should state the findings of the material facts in a discrete form, separate from any statement of the evidence: *Clinton* v *Zdenkovic* [1997] NIJB 234. If an inferred fact is disputed between the parties, the judge should state both the primary facts and the inferred fact drawn from it: *Emerson* v *Hearty*; *Reid* v *Hall* [1975] NI 171; and evidence should be detailed if it elucidates the material facts found or the point of law involves the question whether there is any or sufficient evidence to support a finding of fact: *Schofield* v *Hall* [1975] NI 12 (i.e. an *Edwards v Bairstow* challenge). If a document is material to the point of law, the whole of it or a

copy of it should be appended to the case stated: *Gaimster* v *Marlow* [1984] QB 218. The Court of Appeal in *Dept of Environment* v *Fair Employment Agency* [1989] NI 149, at 158F criticized the court for stating the facts by reference to its own written judgment and for stating the issue of law in the form of statement rather than a question. In stating a case the judge can include facts and conclusions not expressly stated in his judgment, provided that they do not materially change the reasons for the decision: *Hughes* v *European Components* [1990] 2 NIJB 29, at 40-2.

[22] If the case stated does not pose the points of law on which the Court of Appeal's opinion is sought, the court may have to infer that the questions submitted by the appellant are those which are raised. It is not enough to state the question as "whether on the facts found, my decision was erroneous in law": *McKenna v O'Donnell* [1983] NI 149, at 159D. The case will not be heard if it does not show how the determination of the point of law will affect the litigation: *Gosford* v *Blair* [1899] 2 IR 453. If the material facts are not all stated and the court cannot determine those facts on the material put forward by the parties, the court will send the case back to the county court: *Browne* v *McBryan* (1897) 31 ILTR 165. If this is not possible, as where the judge has retired or died, the court will determine the facts as best it can upon the material available, if necessary by inference: *Kealy* v *O'Mara* [1942] IR 616.

[23] Detailed guidance on the form and content of a case stated was provided by this court in *Emerson v Hearty* [1946] NI 35. This concerned a case stated by a County Court judge for the opinion of the Court of Appeal. The shortcomings in the case stated were that while containing a lengthy rehearsal of the evidence adduced it did not set out -

> "…..
> *(a) The precise facts found by the judge who stated the case; and*
>
> *(b) Any inferences or conclusions of fact which he drew from the facts found by him.*"

[24] The case stated was remitted to the County Court judge to be reformulated and for the purpose of reconsidering the question of law to be framed. Murphy LJ stated at 37:

> "*We have thought that this may be a convenient opportunity to call attention to the principles which ought to be observed in drafting Cases Stated. The Case should be stated in consecutively numbered paragraphs, each paragraph being confined, as far as possible, to a separate portion of the subject matter. After the paragraphs setting out the facts of the Case there should follow separate paragraphs setting out the contentions of the parties and the findings of the Judge.*

> *The Case should set out clearly the Judge's findings of fact, and should also set out any inferences or conclusions of fact which he drew from those findings. The task of finding the facts and of drawing the proper inferences and conclusions of fact from the facts so found is the task of the Judge. It does not fall within the province of this Court. Accordingly, it is not legitimate by setting out the evidence in the Case Stated and omitting any findings of fact to attempt to pass the task of finding the facts on to the Court of Appeal. What is required in the Case Stated is a finding by the Judge of the facts, and not a recital of the evidence. Except for the purpose of elucidating the findings of fact it will rarely be necessary to set out any evidence in the Case Stated save in the one type of case where the question of law intended to be submitted is whether there was evidence before the Judge which would justify him in deciding as he did.*
>
> *The point of law upon which this Court's decision is sought should of course be set out clearly in the Case. But we think the Judge is certainly entitled to expect the party applying for the Case Stated to indicate the precise point of law upon which he wishes to have the decision of the appellate Court. It would be convenient practice that this should ordinarily be done in the written application for the Case Stated. We gather that in the present case the Judge had not the assistance of any statement from the applicant for the Case Stated as to the exact point of law which he wished to have raised in the Case."*

This detailed appellate court guidance has lost none of its relevance or vigour with the passage of time. Certain aspects of it are reproduced virtually verbatim in Order 32, Rule 5(6) of the County Court Rules (NI) 1981.

[25] Further and more recent guidance is to be found in the decision of the House of Lords in *SCA Packaging Limited v Boyle* [2009] UKHL 37. Lord Hope, with whom all members of the House agreed, drew attention to the distinction between cases in which the lower judicial authority does not promulgate a decision containing its material findings of fact and others, such as typical tribunal decisions. He stated at [14] – [15]:

> *"[14] The stated case procedure involves the tribunal in stating the findings of fact on which its decision was based, rehearsing the evidence relevant to those findings and giving its reasons. It proceeds upon the assumption that these details are often not given in full, or even at all, at the time when the decision is made. Section 13 of the Stamp Act 1891 provides an early example of the use of this procedure: see now s 13B as substituted by s 109(3) of and para 2 of Sch 12 to the Finance Act 1999. The procedure is cumbersome but appropriate in*

> *such cases. In cases such as the present, however, where a full decision was given by the tribunal in the first instance it makes very little sense for the tribunal to be required to rehearse its decision all over again. If the original decision contains all the tribunal's findings of fact that are relevant to the point at issue and a narrative of the evidence on which the findings were based, it will be sufficient for the decision itself to be used as the basis for consideration of the question of law by the Court of Appeal. All that needs to be added is an introductory narrative and the questions on which the case is being stated.*
>
> *[15] In the present case the chairman set out her original decision with admirable clarity. It contained her findings of fact on all the relevant issues, together with a narrative of the evidence on which those findings were based. Upon receipt of the requisition she began again. She re-wrote all this material, combining the same findings of fact with a fresh but essentially unchanged narrative of the evidence. Her diligence in undertaking this exercise is to be commended. But it turned out, in the event, to have been wholly unnecessary as the original decision contained all the material that was necessary for the determination of the appeal."*

At [16] – [17] Lord Hope drew attention to the imperative of avoiding the mischief of delay in the case stated process.

[26] This court took cognisance of the decision in *Boyle* in two cases heard shortly thereafter, *Rogan v South Eastern Health and Social Care Trust* [2009] NICA 47 and *Fryers v Belfast Health and Social Care Trust* [2009] NICA 57. Attention is drawn to what Girvan LJ stated in *Rogan* at [10]:

> *"[10] As long as the appeal procedure from the Industrial Tribunals continues to be by way of case stated, in the light of Lord Hope's comments (with which the rest of the House agreed) in many if not most instances it will be sufficient for the tribunal to incorporate in the case stated by reference its written decision without the necessity of restating or reformatting what is clear from the contents of the decision. It may be that in some cases it will be necessary to state some additional findings of fact or rehearse some additional evidence not apparent on the face of the decision but that should happen rarely since the tribunal's decisions should set out the relevant findings and reasons with sufficient clarity."*

Appeals by Case Stated from the Lands Tribunal

[27] The relevant provision of primary legislation is section 8(6) of the Lands Tribunal and Compensation Act (NI) 1964:

> "*Any person aggrieved by a decision of the Lands Tribunal as being erroneous on a point of law may require the Lands Tribunal to state and sign a case for the decision of the Court of Appeal …..*"

By rule 29 of the Lands Tribunal Rules (NI) 1976:

> "*(1) An application by or on behalf of a person aggrieved by a decision of the Tribunal for a case stated upon a point of law for the decision of the Court of Appeal shall be made by lodging with the Registrar:*
>
> *(a) Within seven days from the date of the order of the Tribunal, an application in writing stating the point of law upon which the applicant wishes to have the decision of the Court of Appeal, and*
>
> *(b) Within a further 14 days a draft case, so that the case may be perfected within the time prescribed by rules of court.*"

Rule 29(2) addresses the possibility of the Court of Appeal requiring the case stated to be amended:

> "*If upon an appeal by way of case stated any directions are given for the amendments of any decision of the Tribunal, the amendments shall be made by the Tribunal accordingly and the Registrar shall send copies of the amended decision to all persons to whom copies of the original decision were sent.*"

Order 61, rule 1(1) of the Rules of the Court of Judicature (NI) 1980 prescribes certain procedural requirements relating to time limits and other matters <u>following</u> promulgation by the Lands Tribunal of a case stated.

These Appeals

[28] The decision of the Tribunal in the present case is clearly the product of careful thought. It consists of 47 numbered paragraphs. It is divided into the following sections: background; procedural matters; position of the parties; the authorities; the 1995 agreement; the legal principles; discussion; and conclusion. Within the first 11 paragraphs there is some factual material. With one exception there is no indication of whether these factual matters were either expressly agreed

or undisputed. Under the rubric of "Procedural Matters" the names of the three persons who gave evidence to the Tribunal are specified. In later passages of the decision there is brief reference to some of the evidence of the respondent's witness. There is no indication anywhere of the evidence given by the other two witnesses, on behalf of the appellants. There is no indication anywhere in the text of material factual matters in dispute. Most fundamentally, the decision contains no findings of fact.

[29] The first version of the two cases stated is reproduced in [7] above. This is a stand-alone document. It employs the language of "*questions*", "*correct*" and "*finding*". These terms differ from the necessary concepts of *conclusions on the law … the correctness of such conclusions … and questions of law*. They are apt to lead a judicial authority into error, particularly one with limited experience of this species of appellate challenge. The legal representatives of the parties must be alert to their responsibilities in this respect.

[30] Following this court's initial remittal order and accompanying ruling (Appendices 1 and 2 hereto), the Tribunal transmitted two revised cases stated. We have reproduced one of these in [10] above. Neither was compliant with the guidance contained in either of the successive decisions of this court, beginning with *Emerson* or the House of Lord's decision in *Boyle*. Each simply set out in a little more detail certain aspects of the Tribunal's decision. At the outset of the second listing we drew to the attention of the parties' counsel our reservations about this court's ability to determine the appeal in these circumstances. We nonetheless endeavoured to do so and proceeded to receive the submissions of counsel. These merely served to highlight the obstacles and difficulties posed by the shortcomings in the two reconfigured cases stated.

Conclusion

[31] The court has concluded, with considerable reluctance, that it is not properly equipped to determine the appeals substantively. The initial partial remittal order having failed to achieve its objective we consider that a further order of this kind would not be appropriate. In these circumstances, with specific reference to section 38(1)(a) of the Judicature Act the court is of the clear view that it would not be appropriate to confirm, reverse or vary the decision of the Tribunal. The order which we have determined to make, under section 38(1)(b), is to remit the appeal in its entirety for *de novo* consideration and determination by the Tribunal. This provision of the Judicature Act empowers this court, in making such an order, to include "*such declarations or directions as the Court of Appeal may think proper*." Having considered the submissions of the parties, the only direction which we propose to make is that, having regard to the history of the appeals and the complexity of the issues of law which they entail, it would be appropriate for the *de novo* consideration and determination to be undertaken by a constitution of the Lands Tribunal consisting of the President and the appointed member.

[32] There is no winner or loser, no judicially determined "event". In the exercise of our discretion we make no order as to costs *inter – partes.*

APPENDIX 1

[Court of Appeal Order 26/11/20]

[Before: McCloskey LJ, Maguire J and McFarland J]

THE COURT:

1. ADJOURNS the hearing of these appeals.

2. RELISTS the appeals, to be heard on 13 January 2021, half-day time allocation.

3. LISTS the appeals for remote review only at 10.00am on 6 January 2021.

4. IN THE EXERCISE of its powers under s. 38(1)(f) of the Judicature (NI) Act 1978 remits the appeals to the Lands Tribunal for the purpose of restating the case stated AND without prejudice to any material provisions of primary or secondary legislation or any procedural rules or protocols of the Tribunal makes the following

DIRECTIONS:

i. The respondent shall respond in writing to the requisition to state a case by 03 December 2020.

ii. The appellants shall rejoin in writing by 10 December 2020.

iii. The Tribunal shall thereafter determine the requisition in such manner as it considers appropriate.

iv. If the determination of the Tribunal is to accede to the requisition in whole or in part, with or without amendment, the Tribunal shall devise a process and timetable whereby the parties will provide an agreed case stated in draft and the Tribunal shall formally determine its form and content, signed and dated, by 4 January 2021 at latest.

5. RESERVES costs.

6. GRANTS liberty to apply.

APPENDIX 2:

[Transcript of Court of Appeal Ruling 26/11/20]

McCloskey LJ

We have some preliminary observations to make about the appeal. It is an appeal by case stated from the Lands Tribunal and there are two substantive bundles of appeal. In one, the appellant is James P Corey Transport Limited. In the other, the appellant is Owen Jacobson; and in both the respondent is the body known as Belfast Harbour Commissioners. The route whereby the two appeals have ended up in this court appears to be identical and we have traced with some care what that route actually was.

So at the moment, I'm reading from the Corey bundle of appeal. I would ask you to take note of the references to which I am going to make some observation. What we can see is that the Lands Tribunal made its decision on the 18th of February 2020 and made its order on the 18th of May 2020. That prompted, on behalf of the two appellants, a requisition to state a case and, at page 1 of the bundle, we have the letter from Messrs Shean Dickson Merrick to the Registrar of the Lands Tribunal: "Please find enclosed application for the member to state a case". The document that was attached wasn't, in fact, described as a "Requisition"; it was described as "Case Stated by the Lands Tribunal", at page 2. That description might possibly explain the sequence of events which follow thereafter.

Whether that be correct or not, the next document is a document that is signed and dated, "Case stated by the Lands Tribunal", at page 4. The professional member has signed it and the date is the 29th of June 2020 and by that route the case has come before this court, purporting to be a case stated.

Now, it is an indelible fact that there is no orthodox case stated before this court. The form and content of a case stated are well settled, irrespective of the lower court or tribunal from which they emanate. They tend to emanate most frequently from other tribunals, tribunals other than the Lands Tribunal, for example the Industrial Tribunal, the Fair Employment Tribunal and from other lower courts, in particular, magistrates' courts and, to a lesser extent, the county court under the County Courts Order.

A case stated from the Lands Tribunal is an unusual juridical event in this jurisdiction. That may also, to some extent, explain the observation I've made about unorthodox form and content. An orthodox case stated would set out the central issues that were before the lower court or tribunal; the parties' core contentions; the authorities to which the court or tribunal was referred; **crucially, the key findings of fact by the tribunal concerned; and finally the questions of law** that are being stated for the opinion of the Court of Appeal. One would see in an ordinary compliant case stated a logical progression through all of those staging posts.

We have none of that in the present case and that is really the fundamental problem, because we have some difficulty in aligning or relating the two questions stated with the decision.

Now, let us stand back just for a moment. In the abstract, in some cases it may be correct that the shortcomings to which I have referred, would be deficiencies of form, rather than substance, because the absence of an orthodox case stated might be adequately remedied by a combination of the questions formulated for this court and the written decision of the lower court or tribunal, perhaps coupled with an agreed narrative from the parties. However that, we are satisfied, is not this case. We are left to wonder as to what the central issues and core contentions, in particular on the part of the appellants, were in the forum of the Tribunal.

The first thing that appears to have occurred here, as I have already observed, is that the professional member of the Lands Tribunal treated the requisition as a draft case stated and I have suggested why that might possibly have occurred. Second, there is no indication whatsoever of any critical engagement by the Tribunal with the questions raised. We have the impression that the response of the Tribunal to the requisition was one of compulsion to proceed to accede to the application. Furthermore, by virtue of the procedure that was adopted, there was no input by the respondent, the Harbour Commissioners, with the result that there was no process of an adversarial nature before the Tribunal in its free standing, detached decision to accede to the requisition and to proceed to state the case.

One particular consequence of the foregoing is that we read in the respondent's skeleton argument contentions which should properly have been considered by the Tribunal in a critical evaluation of the two questions that were posed for it. If I may pause and give one live example in this court: there is before this court at present, a case called *Magee v The Chief Constable*. That is a case stated from the County Court which, as I have observed, is a relatively uncommon event also. In that case, the judge, having dismissed the plaintiff's case, was asked to state seven questions of law for the appeal at the Court of Appeal and, in a detailed ruling, he declined to state six of them, but reluctantly acceded to the application to state one of the questions of law only.

So the parties can see that the court is troubled about the nature, content and scope of the appeal and, in particular, the process which has culminated in the appeal to the court. That leads to a provisional observation. The observation, which I emphasise is provisional in nature, derives from the powers conferred on this court in section 38 of the Judicature (Northern Ireland) Act 1978 and, in particular, in section 38, sub-section (1)(f). The power which this court is at liberty to exercise is framed there in the following terms:

> "*The court is empowered, where the appeal is by case stated, to amend the case stated or remit it with such declarations or directions as the court may think proper, for hearing and*

determination by the original court or for a re-statement or amendment or for a supplemental case to be stated thereon."

We have provisionally formed the view that that is the power which the court should exercise in the circumstances which I have outlined. The exercise of that power, accompanied by appropriate directions if required, would address all of the shortcomings and concerns which I have endeavoured to ventilate in this summation. So that is where we stand at present.

The next observation is a broader one. It would be helpful if this court were to be alerted to the question of whether there is another series of appeals before the Lands Tribunal, awaiting the outcome of this appeal, the extent, if any, to which this is a lead case or a test case and so forth; perhaps you would reflect on that.

[HAVING ADJOURNED AND CONSIDERED THE PARTIES' SUBMISSIONS]

RULING

McCloskey LJ

We will draw up a formal order and the order will be available not later than Monday of next week, 30 November 2020. The order will be an order pursuant to section 38(1)(g) of the Judicature (Northern Ireland) Act 1978 remitting the case to the Lands Tribunal for the purpose of formulating the case stated afresh. We think it better that the Tribunal begin this exercise from scratch.

This exercise will be designed to address the procedural and substantive shortcomings which this court has identified; that is the substantive shortcomings in the case stated and the procedural shortcomings in the process which was applied in the decision to state a case for the opinion of this court. Adversarial and critical elements will be required in the new process. Thus the respondent should make a response in writing, by way of written submission, to the requisition, followed by a reply by the appellants. The Tribunal will have a range of choices at that point. It will not be obliged to accede to the application and, indeed, will be at liberty to refuse the application in whole or in part and to rephrase the proposed questions of law or to devise new questions. We apprehend that all of those options may have been overlooked by the Tribunal in this case.

One of the main defects in the present framework is the absence of a clear nexus between the questions stated for the opinion of this court on the one hand and, on the other hand, the case made by the appellants, particularly in relation to the first question and the associated findings of the Tribunal. We are declining to proceed on

a basis which would leave this court speculating on important issues of this kind. We trust that reformulated cases stated will rectify this problem.

There will be a relisting before this court on the 13 January 2021 and we will also incorporate a pre-hearing review listing on 7 January at 10.00 am.

We emphatically do not intrude on anything in the Lands Tribunal Rules of Procedure or anything in the primary legislation relating to the process for stating a case for the opinion of this court.

The transcribed ruling of this court will accompany the Order which will follow today's listing.

Finally, we reserve today's costs and there will be liberty to apply.