**THE HIGH COURT**

**JUDICIAL REVIEW**

[2022] IEHC 488

**[2020 643 JR]**

**BETWEEN**

**DENIS RIORDAN**

**APPLICANT**

**AND**

**THE IRISH FINANCIAL SERVICES APPEALS TRIBUNAL**

**RESPONDENTS**

**JUDGMENT of Mr. Justice Heslin delivered on the 3rd day of August, 2022**

**Introduction**

**1.** By order made on 28 June 2021 (Hyland J) the applicant was granted leave to apply by way of application for judicial review for the reliefs set out at paragraph (d) on the grounds set out in paragraph (e) of the applicant's Statement of grounds which is dated 16 September 2020.

**2.** Paragraph (d) of the said statement of grounds makes clear that the following relief is sought by the applicant:

> *"A declaration that at the time of lodging my appeal, in accordance with section 31 of the Anglo-Irish Bank Corporation Act 2009, against the Assessor's determinations there was no appeal fee payable, as no legislation had been enacted to provide for the payment of an appeal fee.*
>
> *A declaration that the Irish Financial Services Appeals Tribunal acted ultra vires its powers by demanding the payment of an appeal fee of €5000 that was not applicable to an appeal brought under section 31 of the Anglo-Irish Bank Corporation Act 2009.*
>
> *A declaration that the Irish Financial Services Appeals Tribunal violated my constitutional right to fair procedures by failing to give detailed reasons as to why my supplemental submissions on the requirement to pay the demanded appeal fee were mistaken and unfounded.*
>
> *An order of certiorari quashing the decision of the Irish Financial Services Appeals Tribunal to strike out my appeal against the Assessor's determinations, Appeal No. 027/2020 DENIS RIORDAN -v- DAVID TYNAN.*
>
> *An order of mandamus requiring the Irish Financial Services Appeals Tribunal to reinstate my appeal against the Assessor's determinations, Appeal No. 027/2020 DENIS RIORDAN -v- DAVID TYNAN.*
>
> *Damages and costs."*

**3.** Certain facts are not in dispute. The applicant is a former shareholder in Anglo-Irish Bank Corporation (hereinafter "the Bank"). He initially held 10,000 shares in the Bank. On 15 January 2009, the applicant purchased a further 120,000 shares in the Bank, at a cost of €0.22 each.

**4.** On the same day, the Bank was taken into public ownership by a minute by the then Minister for Finance, on behalf of the State.

**5.** On 21 January 2009, the Oireachtas enacted the **Anglo-Irish Bank Corporation Act 2009** (hereinafter "the 2009 Act").

**6.** The 2009 Act provided, inter-alia, for the appointment of an "Assessor" to determine the amount of compensation payable, if any, to former shareholders of the Bank.

**7.** On 16 November 2018, the Minister for Finance appointed Mr David Tynan as the Assessor.

**8.** On 23 April 2020 the Assessor, in accordance with section 27 of the 2009 Act, published his report. The Assessor determined that at the date the Bank was taken into state ownership its share price had a value of 'nil' and, therefore, no compensation was payable to any shareholders of the Bank.

**9.** The respondent in the present proceedings, the Irish Financial Services Appeals Tribunal, (hereinafter "the Tribunal") was established pursuant to section 57A of the **Central Bank Act 1942**,as amended, (and as inserted by the Central Bank and Financial Services Authority of Ireland Act, 2003) (hereinafter "the 1942 Act, as amended" or "the 1942 Act").

**10.** In exercise of the powers conferred on the tribunal by section 57AI of the 1942 Act as amended, the procedural rules governing its operation are provided for in the **Irish Financial Services Appeals Tribunal Rules 2008,** S.I. No. 244 of 2008 (hereinafter "the 2008 Rules").

**11.** Under Rule 4, any person may bring an appeal to the tribunal from an appeal decision and this must be initiated by filing a notice of appeal. For the tribunal to process an appeal in accordance with its Rules, a fee of €5,000 is payable and this must be lodged with the notice of appeal within 10 days of such lodgement, pursuant to Rule 5. The foregoing can be extended to no more than 14 days and the notice of appeal may be struck out if the said fee is not paid.

**12.** The respondent to an appeal has 14 days within which to deliver its response in the prescribed form. The appellant can deliver a reply thereafter. The tribunal's website provides information including as to the prescribed forms.

**13.** Once the papers have been exchanged between the parties and any preliminary issues or applications have been dealt with, the 3 tribunal members designated by the chairperson as the panel assigned to the case will hear the appeal and make a determination.

**14.** On 27 May 2020 the applicant submitted a notice of appeal pursuant to section 31 of the 2009 Act, contending that the Assessor's report should be set aside for the reasons detailed in the said notice of appeal.

**15.** The notice of appeal was submitted by the applicant to the Tribunal, as prescribed by the 2008 rules. This sought to appeal the Assessor's determination. A copy of same comprises exhibit "HCOH1" to the affidavit sworn, on 30 July 2021, by Ms Helen Claire O'Hanlon, who is the registrar of the tribunal.

**16.** The aforesaid notice of appeal was accompanied by a notice of application, as prescribed by the 2008 rules, seeking a waiver/reduction in the appeal fee of €5000, pursuant to Rule 5(3) of the 2008 rules.

**17.** Rule 5 (3) of the 2008 rules permits the respondent Tribunal to waive the appeal fee, in whole or in part, if satisfied that the payment of the fee would cause serious financial hardship and if satisfied that to apply the fee would cause injustice to an appellant.

**18.** A copy of the applicant's notice of application, which seeks a waiver/reduction of the €5000 fee, comprises exhibit HCOH2 to Ms O'Hanlon's affidavit. It is entitled:

**"Irish Financial Services Appeal Tribunal**

**Register number:**

**In the matter of part VIIA of the Central Bank Act 1942**

**Notice of Application"**

**19.** As well as state the applicant's name, address and email, the following information is given at part 3, as regards the nature of the application: *"I request a waiver of the appeal fee as I am a 73-year-old retiree and would suffer an injustice if my appeal was not heard due to being unable to pay the extremely large Appeal fee."*

**20.** Part 6 of the application form states: *"6. Reasons supporting application. Please set out concisely the facts, circumstances and reasons which you say support the granting of your application*." The applicant has left part 6 'blank' and has provided no details.

**21.** Part 7 of the application form states: *"7. Documents attached. Please identify and attach copies of any document referred to or relied on in your application".* Again, the applicant has left part 7 'blank' and has attached no copy documents."

**22.** On 29 May 2020, Ms O'Hanlon, on behalf of the Tribunal emailed the applicant in the following terms:

> *"Dear Mr Riordan,*
>
> *many thanks for submitting your notice of appeal and notice of application for a waiver of the appeal fee.*
>
> *I would be grateful if you would submit supporting documentation in support of the application for the waiver of the fee and the tribunal will consider the application.*
>
> *Kind regards…"*

**23.** On the same date, Ms O'Hanlon emailed the applicant to advise him that, as the first matter to be determined would be whether he had complied with time-limits, and whether the decision in question was an "appealable decision" under the Central Bank Acts, he was requested to submit the correspondence received from the Assessor, as well as the Assessor's report. Ms O'Hanlon sent a reminder by email on 2 June 2020.

**24.** On 3 June 2020, the applicant emailed Ms O'Hanlon stating that the decision challenged was *not* an appealable decision under the Central Bank Acts, but that it *was* an appealable decision under section 31 of the 2009 Act and the Anglo-Irish Bank Corporation regulations of 2019. The applicant also attached an email, dated 1 May 2020, from the Assessor, Mr Tynan, to the applicant, the text of which read, as follows:

> *"Dear Mr Riordan,*
>
> *I refer to your email dated 16th January last together with your submission which was attached to that email.*
>
> *Please be advised that I considered your submission in full prior to finalising my report.*
>
> *As you are aware, I was subject to a judicial review which was heard in late 2019. On 24 January 2020, Mr Justice O'Moore gave his decision in relation to the points raised against me in the judicial review proceedings. In his decision, he refused all reliefs sought by the former shareholder of Anglo-Irish bank in the judicial review proceedings. At a further hearing on 28 February 2020, Mr Justice O'Moore ordered the former shareholder of Anglo-Irish Bank to pay the costs incurred by me in the proceedings. A 28-day stay was placed on the order to pay costs, pending any appeal that the former shareholder may bring. Mr Justice*

*O'Moore also extended the stay on the publication of the final report by the Assessor for 28 days from 5th of March 2020, the date on which the court order was perfected.*

*I wish to advise you that on 23 April 2020, I issued my report to the Minister for Finance in accordance with the Act. On 29 April 2020 the Minister of Finance published the report. The report can be accessed online via the following link…*

*Yours sincerely,*

*David Tynan"*

**25.** 4 June 2020, Ms O'Hanlon wrote to the applicant in the following terms:

*"Dear Mr Riordan,*

*I refer to our previous correspondence in relation to your notice of appeal dated 27 May 2020. I acknowledge receipt of a copy of the email correspondence dated first of May 2020 from the respondent, David Tynan, notifying you of the decision.*

*I have spoken to the chairman of the* Tribunal *about the status of your application and he has asked me to draw your attention to the following matters:*

1. *if you intend to proceed with the appeal it is important that the existing application be brought into compliance with the requirements of the tribunal rules which have been sent to you. Please note particularly rule 4(2).*

2. *You must indicate your standing to be an appellant. You were presumably a shareholder in the Bank at the relevant time, but you do not indicate what your shareholding was and whether you were one of those who contacted the Assessor or made representations to him during the procedure.*

3. ***You have made an application for waiver of the appeal fee on the basis of financial hardship. However, it will be necessary for you to elaborate upon this and provide more detailed of your circumstances to support your application.***

*I would urge you to take steps immediately to put your application in order.*

*In accordance with rule 4(3) a copy of the notice of appeal will be sent to Mr Tynan as respondent. Having consulted with the chairman, I should also mention to you that in view of rule 4(4) the tribunal will also send a copy of the notice of appeal to the Minister for Finance as a person interested in the appeals subject matter being the addressee of the Assessor's decision.*

*I waited in from you with any additional documents upon which you intend to rely.*

*Yours faithfully…"* (Emphasis added)

**26.** By letter dated 8 June 2020, the applicant responded enclosing his notice of appeal and a copy of the submissions which he had sent to the Assessor, as well as the latter's report. The applicant confirmed that he was a former shareholder, and that he was identified as such in his submissions to the Assessor. He also confirmed, as *per* his submissions, that he held 130,000 shares in the Bank, 120,000 of which were bought on 15 January 2009. With regard to Ms. O'Hanlon's request for additional detail in support of his application for the waiver/reduction of the appeal fee, the applicants letter concluded with the following statement:

*"I am preparing a submission to the Tribunal re-the Appeal fee and I will forward it to you as soon as I have it ready."*

On 15 June 2020, Ms O'Hanlon wrote again to the applicant in relation to the appeal fee, in the following terms:

> *"Dear Mr Riordan,*
>
> *I refer to the above matter and your correspondence with enclosures dated 8 June 2020. I refer further to your application for a reduction or waiver of the appeal fee of €5000.*
>
> *Rule 5 of the Tribunal Rules requires the appeal fee to be lodged within 10 days of the submission of the notice of appeal with a possible extension to 14 days. That has now expired. If the tribunal is to reduce or waive the appeal fee it must have some information as to the financial hardship or injustice relied upon in order to assess the application. The rule also provides that in the event of a failure to lodge the fee, the registrar, at her sole discretion, may strike out the notice.*
>
> *Accordingly, unless you comply with the appeal fee requirements of Rule 5 and confirm that you intend to continue the appeal, before Friday, 19 June 2020, the notice of appeal will be struck out and the respondent will be so informed.*
>
> *Yours faithfully..."*

**27.** On 15 June 2020, the applicant wrote to the tribunal to state that he was withdrawing his application for a waiver/ reduction in the appeal fee. He went on to state his view that the decision challenged is not an appealable decision under the 1942 Act but, rather, under section 31 of the 2009 Act. In the applicant's view, neither the 2009 Act, nor its regulations, provide for an appeal fee. The applicant asserted that no rules had been enacted since the 2009 Act requiring any appeal fee. He also asserted that the 2009 Act did not legislate for the use of the 2008 rules and, thus, the 2008 rules do not apply. He also submitted that the appeal fee was exorbitant, lacked proportionality, was objectively unreasonable, unconscionable and prohibitively expensive, when compared with fees and appeal fees charged by other appeals bodies that he was aware of. It is the foregoing assertions made by the applicant which are at the heart of the present proceedings.

**28.** On 18 June 2020, Ms O'Hanlon replied to the applicant in the following terms:

> *"Dear Mr Riordan,*
>
> *The tribunal acknowledges receipt of your letter of 15th of June 2020 in reply to correspondence dated 4th and 15th of June 2020 in relation to the outstanding issue of your application to seek a waiver or reduction of the appeal fee required to be lodged with your appeal under rule 5 of the IFSAT rules 2008.*
>
> *Having consulted with the chairman on the content of your letter, I am to reiterate to you that the tribunal will consider an application, grounded on appropriate supporting documentation, for waiver or reduction of the appeal fee as I indicated to you in my letter of 15 June.*
>
> *If you do not do so, your appeal will be struck out for the following reasons:*
>
> 1. *the appeal fee of €5000 is required to be lodged with a notice of appeal subject to the possibility of an application for its waiver or reduction at the discretion of the registrar.*
> 2. *On 27th of May 2020 you applied for a waiver or reduction of the appeal fee, but notwithstanding reminders from the registrar you failed to submit any supporting information of financial hardship or injustice which would enable the tribunal to determine the application under rule 5(3).*

3. *In those circumstances the tribunal informed you by letter of 15th of June 2020 that unless such information was submitted, the appeal would be struck out on 19 June 2020.*

4. *In response you notified the tribunal in your letter of 15th of June 2020 that you were withdrawing your application for waiver or reduction of the appeal fee and submitted inter-alia:*

> 'The appeal fee of €5000 stipulated by S.I. No. 224 of 2008 is applicable to an appeal against an appealable decision of the regulatory authority under the jurisdiction granted by the Central Bank Act 1942 as amended. My appeal is not brought under the jurisdiction of the Central Bank Act 1942 as amended.
>
> My appeal is brought under the jurisdiction granted by the Anglo-Irish Bank Corporation Act 2009.
>
> Neither the Anglo-Irish Bank Corporation Act 2009 nor the Anglo-Irish Bank Corporation (Section 36) regulations 2019 stipulated the payment of any such fee for bringing this appeal.
>
> To the best of my knowledge, no rules have been enacted, since both the Anglo-Irish Bank Corporation Act 2009, and the Anglo-Irish Bank Corporation (Section 36) regulations 2019 came into effect, require the payment of any such appeal fee.
>
> The Anglo-Irish Bank Corporation Act 2009 specifically legislates for the use of provisions of chapter 3 of part VIIA of the Central Bank Act 1942 as amended.
>
> The Anglo-Irish Bank Corporation Act 2009 does not legislate for the use of provisions of S.I. No. 224 of 2008 for this appeal.
>
> When S.I. No. 224 of 2008 was enacted, the jurisdiction to hear appeals under the Anglo-Irish Bank Corporation Act 2009 did not exist. Therefore, the appeal fee of €5000 could not have been intended to apply to such an appeal.'

5. *The tribunal considers that your assertion is mistaken and unfounded.*

6. *Your appeal is brought under the provisions of the Central Bank Act 1942(as amended) as applied and adapted to appeals against the respondent Assessor by the provisions of the Anglo-Irish Bank Corporation Act 2009.*

7. *Section 31(8) of the 2009 Act applies the provisions of section 57L of the Central Bank Act to such appeals subject to the exception of subsections (1) and (4) of section 57L. It follows that subsection (2) is not excepted and is applied.*

8. *That subsection provides that an appeal must:* "be accompanied by the fee(if any) prescribed by the rules".

9. *The assertions as to the exorbitant amount or disproportionality of the fee fails to take account of the fact that it's amount in any given case may be reduced or waived entirely.*

10. *While your letter of 15th June withdraws your application for waiver or reduction of the fee and states explicitly that you will not pay it, in order to give you an opportunity to consider the view of the tribunal as set out in paragraphs 6 – 9 above and to reconsider renewing your application, I will, as registrar, postponed my decision on the striking out of the appeal until 5 PM on Monday next 20 to June 2020. In the absence of a response the appeal will be struck out at that time and the decision will be communicated to the respondent and to the Minister for Finance.*

*The decision will thereafter be communicated to the respondent and to the Minister for Finance.*

*Yours sincerely…"*

**29.** By letter dated 22 June 2020, the applicant stated, *inter alia*, that his appeal was *not* an appealable decision against the decision of a Regulatory Authority but was an appeal against the decision of the Assessor under the 2009 Act. It will be recalled that, in his 15 June 2020 letter, the applicant withdrew his notice of application, dated 29 May 2020, for a waiver of the appeal fee. The applicant did not state in his 22 June 2020 letter, that his position was other than articulated in his 15 June 2020 letter. The applicant reiterated, in his 22 June correspondence to the Tribunal that there was no provision in the 1942 Act, as amended, providing for an appeal against a decision of the Assessor appointed under the 2009 Act. He repeated his contention that the 1942 Act, as amended, did *not* apply to his appeal and that the 2008 rules could *not* apply to his appeal. It is fair to say that the applicant did not engage with the request, which the Tribunal had repeatedly made, that he provide additional detail in relation to his original application to waive or reduce the appeal fee. Not engaging with the request for further detail was of course entirely consistent with the applicant having withdrawn his application for a waiver of the appeal fee. It was very clear from the contents of his 22 June letter that he took the stance that no fee whatsoever was payable. The applicant's letter concluded with the following paragraph:

*"I request the tribunal to reconsider the magnitude of the fee payable (if any), after consultation with the Minister for Finance and using the appropriate criteria for setting an appeal fee for this type of appeal as laid down by the Minister for Finance in giving the tribunal the jurisdiction to set such a fee."*

**30.** On 24 June 2020, Ms O'Hanlon replied to the applicant, as follows:

"*Dear Mr Riordan,*

*The tribunal acknowledges receipt of your letter of 22 June 2020.*

*The tribunal has considered your supplemental submission with regard to the obligation to pay the appeal fee. As previously outlined, the tribunal considers that your assertion is mistaken and unfounded.*

*As you have withdrawn your application for waiver or reduction of the appeal fee, the appeal in this matter has been struck out in accordance with the provisions of rule 5(2) of the Irish Financial Services Appeals Tribunal Rules 2008.*

*Please note that the decision will be communicated to the respondent and to the Minister for Finance.*

*Yours sincerely…"*

**31.** On 22 September 2020, the applicant wrote to the tribunal in the following terms:-

*"Dear Registrar,*

*Yesterday, 21st September, I applied to the High Court for an order granting leave to apply for judicial review of the decision of the Irish Financial Services Appeals Tribunal to strike out my appeal against the Assessor's determinations, appeal no.027/2020 DENIS RIORDAN -V- DAVID TYNAN.*

*Having opened my grounding affidavit to the court, Judge Meenan adjourned my application for leave until 2 November 2020, for mention on that date, in order to determine if an Isaac Wonder* (sic) *order made against me has any effect on my application for leave.*

*Judge Meenan further instructed me to notify you be* (sic) *letter of these proceedings and to forward copies of my grounding statement and verifying affidavit to you, copies are enclosed. Both were filed in the High Court Central office on 17 September 2020 for hearing on Monday, 21 September 2020.*

*Copies of Isaac Wonder* (sic) *order, High and Supreme Court, also enclosed…"*

**32.** It is clear from the terms of this court 28 June 2021 order that the application for leave was on notice to the respondent and I have previously referred to the leave granted.

**Discussion and decision**

**33.** It is fair to say that the applicant's pleaded grounds, as well as the contents of his written submissions dated 12 January 2022, reflect the case which he put forward in correspondence, in particular, his letters to the respondent Tribunal dated 15th and 22 June 2020 - the principal additional argument being that respondent allegedly failed to give reasons as to why the applicant is wrong in his belief that there is no legal basis for the appeal fee (and the subsidiary contention that such an alleged failure to give reasons denied the applicant the opportunity to disprove those reasons).

**34.** The oral submissions made with clarity and no little skill by the applicant during the hearing which took place on 10 March 2022 were based squarely on his written submissions. These were replied to by Mr Lewis S.C. for the respondent and I have very carefully considered all submissions, written and oral, and I am grateful to both parties for the assistance provided to the court.

**35.** In truth, these proceedings exclusively concern the question of statutory interpretation and the applicant's case is determined by the proper interpretation of relevant legislative provisions.

**Relevant legislation**

**36.** Certain legislation is of fundamental importance to the present proceedings and, for the sake of clarity, is it is appropriate to refer to certain provisions, in particular, from the 2009 Act, the 1942 Act and the 2008 Rules.

**The 2009 Act**

**37.** S. 25 of the 2009 Act, is entitled "*Determination of their reasonable aggregate value*" and it begins in the following terms:

*"25.-(1) the Assessor shall determine the fair and reasonable aggregate value of the transferred shares of each class and the extinguished rights as at 15 January 2009 for the purposes of the payment of fair and reasonable compensation for the acquisition of those shares and the extinction of those rights.*

*(2) The Assessor shall determine the value referred to in subsection (1)-*

*(a) on the basis of the true financial state of Anglo bank on 15 January 2009, taking into account the underlying market values of Anglo-Irish Bank's assets and the extent of its actual, contingent and prospective liabilities at that date,*

*(b) having regard to the rights attaching to each class of transferred shares, and*

*(c) assuming that no financial assistance, investment or guarantee (other than the guarantee already provided under the credit institutions (financial support) Act 2008) would in future be provided to or made in Anglo Irish bank, directly or indirectly, by the State…"*

**38.** S.31 of the 2009 Act is headed "*Review of determination of compensation, etc."* and begins as follows:

*"31. – (1) An appeal lies to the Irish Financial Services Appeals Tribunal (in this section called "the Tribunal") against-*

*(a) the Assessor's determination under section 25,*

*(b) the Assessor orders rejection of a person's claim for compensation, or*

*(c) the Assessor's determination of the sum that a person is entitled to as compensation…"*

**39.** Section 31 (8) is of particular relevance to the present proceedings and it states the following:

*"(8) The provisions (except subsections (1) and (4) of section 57L) of Chapter 3 of part VIIA (inserted by the Central Bank and Financial Services Authority of Ireland Act 2003) of the Central Bank Act 1942 apply to an appeal under this section, except that references in that Chapter to the regulatory authority are to be read as references to the Assessor."*

**The 1942 Act**

**40.** Part VIIA of the 1942 Act as amended, applies to appeals brought under section 31(1) of the 2009 Act. That is clear from section 31(8), to which I have referred. S. 31(8) also makes clear that only Sections 57L(1) and (4) within Chapter 3 of Part VIIA do not apply.

**Part VIIA**

**41.** Part VIIA of the 1942 as amended is entitled "*Irish financial services appeal tribunal*" and it contains 5 Chapters.

**42.** Chapter 1, entitled "*Preliminary*", contains sections 57A and 57B and sets out definitions contained within Part VIIA, as well as the objects of Chapter 1. I will presently refer to certain definitions. The "*objects*" described in S.57B of Part VIIA are to establish the tribunal as an independent tribunal to hear and determine appeals under that Part; to exercise such jurisdiction as is conferred on the Tribunal; to ensure the tribunal is accessible, its proceedings are efficient and effective, and its decisions are fair; and to enable proceedings before it to be determined in an informal and expeditious manner.

**43.** Chapter 2, comprising sections 57C to 57K, is headed "*Constitution and jurisdiction of appeals tribunal".* This Chapter begins with section 57C, entitled "*Establishment of the Appeals Tribunal*" and goes on to state that "*A tribunal called… in the English language the 'Irish Financial Services Appeal Tribunal' is established by this section."*

**44.** Chapter 3 is entitled "*Hearing and determination of appeals*" and sections 57L to 57AI concern the procedures relating to hearings and the determination of appeals.

**45.** Chapter 4 is entitled "*References and appeals to High Court*" and comprises sections 57AJ to 57AM.

**46.** Chapter 5, comprising sections 57AN to 57AZ, deals with "*Miscellaneous"* matters.

**Part VIIA, Chapter 1, Section 57A**

**47.** Section 57A of Chapter 1 of Part VIIA is entitled "*Interpretation Part VIIA and Schedule 5".* It sets out a number of definitions. Importantly, for present purposes, is that the section begins as follows:

"*57A.-(1) In this Part and Schedule 5-*

*'affected person' means a person whose interests are directly or indirectly affected by an appeal decision;*

*'appeal' means an appeal under this Part;*

*'appealable decision' means a decision of the Bank that is declared by a provision of this Act, or of a designated enactment or designated statutory instrument, to be an appealable decision for the purposes of this Part;*

*'appellant' means a person who has lodged an appeal;*

*'Chairperson' means the Chairperson of the Appeals Tribunal;*

*…*

*'Registrar' means the registrar of the Appeals Tribunal;*

*'the rules' means rules of the appeals tribunal made and in force under section 57AI…*"

**48.** It is perfectly clear from the foregoing, that the definitions, including of an "*appeal*"; "appealable decision" and "the rules" are *not* confined to Chapter 1 only. On the contrary, S. 57A makes it explicit that the definitions set out therein apply to the entire of Part VIIA (which has 5 Chapters) and Schedule 5 of the 1942 Act.

**49.** Similarly, an "*appeal*" is one brought under the entire of the relevant "*Part"* being, of course, Part VIIA.

**50.** Thus, a fundamental error which underpins the applicant's case is his insistence that Chapter 3 of Part VIIA must be read in isolation and entirely divorced from Chapter 1 and the definitions contained therein.

**51.** It might also be said that one cannot consider the contents of Chapter 3 divorced from the reality that it is pursuant to Chapter 2 that the Tribunal has been created to which the appeal lies. In other words, whilst S. 31 of the 2009 Act undoubtedly creates the right *of* appeal against the Assessor's decision, this right of appeal is *to* a body established, not by the 2009 Act, but by the 1942 Act. This underlines the error in the proposition advanced by the applicant to the effect that his appeal is exclusively under the jurisdiction of the 2009 Act and that it constitutes an appeal which, on his case, is wholly divorced from the jurisdiction of the 1942 Act. In reality, the very existence of and architecture concerning the Tribunal derives from the 1942 Act and the 2008 Rules made thereunder.

**52.** Remaining, for the moment, with the definitions set out in Chapter 1 of Part VIIA of the 1942 Act - specifically, that of "*appealable decision*" - the Oireachtas have made clear in S.57A that this is *not* limited to a decision which is so declared by a provision in the 1942 Act. The definition in S.57A *also* includes a decision which is declared *"…to be an appealable decision for the purposes of this Part"* by a provision in "*…a* ***designated enactment*** *or designated statutory instrument…*" (emphasis added).

**53.** The ordinary meaning of the words "*appealable decision*" as employed in the phrase "*…a decision…that is declared by…a designated enactment or designated statutory instrument, to be an appealable decision for the purposes of this Part"* is a decision in respect of which an appeal lies. S.31(1) of the 2009 Act states that "*an appeal lies to"* the Tribunal against the Assessor's determination under section 25 of the 2009 Act.

**54.** If there was any doubt about the matter, and I am satisfied there is none, Section 2 of Part I of the 1942 Act, as amended, is entitled *"Interpretation"* and it states *inter alia*:

> *"2.(1) In this Act, unless the context otherwise requires-*
>
> *…*
>
> *'designated enactments' means, subject to subsection (2A), the enactments specified in Part 1 of Schedule 2 and the statutory instruments made under any of those enactments;"*

***55.*** Part 1 of Schedule 2 is entitled *"Enactments"* and specifies 49 pieces of legislation, with reference to their *"Item"* number; "*Number and year*"; "*Short Title*"; and "*Provisions".* Item 35 is the 2009 Act and, under the heading "Provisions", is stated: *"The whole Act other than section 2".*

**56.** In short, the definition of 'appealable decision' includes a decision which is said by a designated enactment to be appealable. The 2009 Act is, without doubt, a designated enactment and S.31(1) of the 2009 Act states that *"an appeal lies to"* Tribunal against the Assessor's determination under section 25 of the 2009 Act.

**57.** Moreover, S.31 (8) of the 2009 Act make clear that the provisions (except subsections (1) and (4) of section 57L) of Chapter 3 of part VIIA apply to such an appeal (except that references in Chapter 3 to the Regulatory Authority are to be read as references to the Assessor).

**58.** A central element of the applicant's case is that the determination of the Assessor in respect of which an appeal lies to the tribunal is not an 'appealable decision'. I am entirely satisfied, however, that on a literal interpretation of the relevant legislation, the applicant's appeal was, without doubt, an 'appealable decision' under the 2009 Act for the purpose of Part VIIA of the 1942 Act, as amended.

**59.** This finding, which flows from a literal interpretation of the relevant provisions in the context in which they are used, is fatal to the case which the applicant seeks to make.

**Part VIIA, Chapter 3 "Hearing and determination of appeals"**

***60.*** Chapter 3 of Part VIIA of the 1942 Act, as amended, is headed *"Hearing and determination of appeals"* and, as I have observed, comprises Sections 57L to 57AI, inclusive.

**61.** Section 57L is entitled "*Right of appeal to appeals tribunal against appealable decision*" and provides as follows:

> *"57L.-(1) An affected person may appeal to the Appeals Tribunal in accordance with this section against an appealable decision of the Bank."*

***62.*** Before proceeding further, it is appropriate to state that it makes perfect sense for S.57L(1) to have been *excluded,* in the manner made clear by S. 31(8) of the 2009 Act. This is because S. 31(1) creates a right of appeal to the Tribunal, not against a decision by the *Bank* but in respect of a decision by the *Assessor* (the right to appeal against the *Bank's* decision is given to an affected person by S.57L(1)). Returning to what S.57L provides, subsection (2) is in the following terms:

> *"(2) an appeal must-*
>
> *(a) be in writing and state the grounds of appeal, and*
>
> *(b) be lodged with the Registrar within 28 days after the Bank notified the affected person of the decision concerned, or within such extended period as the Registrar may allow, after consulting the Chairperson, and*
>
> *(c)* ***be accompanied by the fee (if any) prescribed by the rules****.*

*(3) As soon as practicable after an appeal is lodged with the Registrar, the Registrar is required to give a copy of the appeal to the Bank.*

*(4) The Bank is the respondent to every appeal.*" (emphasis added)

**63.** It will be recalled that S.31(8) of the 2009 Act make explicit that the provisions of Chapter 3 of part VIIA of the 1942 Act apply to an appeal under that section, with only two provisos. The first is that subsections (1) and (4) of section 57L do not apply. The second is that references in Chapter 3 to the Regulatory Authority are to be read as references to the Assessor.

**64.** Thus, (*per* S.57L(2)(c)) an appeal of the type the applicant sought to make must be accompanied by the fee, if any, prescribed by the rules. Those rules comprise the rules of the Tribunal made and in force under section 57AI of the 1942 Act, as amended.

**65.** Before looking at S.57AI, and the rules made thereunder, it is appropriate to say that it is also perfectly clear why S.31(8) of the 2009 Act excluded S57L(4) of the 1942 Act, namely, because the *Bank* is not the respondent to an appeal against the *Assessor's* decision. This exclusion of S57L(4) 'dovetails' precisely with S.31(3) of the 2009 Act (which states that "*The Assessor is to be the respondent to an appeal under subsection (1)"*).

**66.** At this juncture, it is also worth making the very obvious point that the legislature, when making clear that Sections 57L(1) and (4) were *excluded,* was equally clear as to what was *not* excluded. In short, there is no question of the Oireachtas having excluded Section 57L(2) or 57L(3) and I now turn to the *"rules"* referred to in S.57L(2)(c).

**67.** In the manner examined earlier, the definitions in Chapter 1 of Part VIIA of the 1942 Act, as amended, apply to the entire of Part VIIA, including, very obviously, to Chapter 3. As set out above, S.57A in Chapter 1 specifies, *inter alia,* that for the purposes of Part VIIA "'*the rules' means rules of the Appeals Tribunal made and in force under section 57AI…*" (in other words, the rules which the Tribunal is empowered to make under S.57AI and which can be found in Chapter 3). It is now appropriate to turn to section 57AI.

**<u>Section 57AI of the 1942 Act</u>**

**68.** Section 57AI of the 1942 Act, as amended, is entitled *"Appeals Tribunal may make rules of procedure"* and it states the following:

"*57AI.-(1) The Appeals Tribunal may make rules, not inconsistent with this Part, for or with respect to any matter-*

*(a) that by this Part is required or permitted to be prescribed by the rules, or*

*(b) that is necessary or convenient to be prescribed in relation to the practice and procedure of that Tribunal.*

*(2) Without limiting subsection (1), the rules may provide for all or any of the following matters:*

*(a) the responsibilities of the Registrar or other staff of the Appeals Tribunal under this Part;*

*(b) fixing the places and times for holding hearings of the Appeals Tribunal;*

*(c) the representation of parties and hearings of the Appeals Tribunal;*

*(d) the discovery of documents relating to proceedings before the Appeals Tribunal;*

*(e) notifying decisions of the Appeals Tribunal to parties to proceedings before it;*

*(f) the means for, and the practice and procedure to be followed in, the enforcement and execution of decisions of the Appeals Tribunal;*

***(g) the fees payable in respect of lodging appeals with the Appeals Tribunal;***

***(h) the waiver of fees payable in respect of lodging appeals with the Appeals Tribunal (whether at the time of lodgement of an appeal or otherwise);***

*(i) the refund, in whole or in part, of fees if proceedings before the Appeals Tribunal terminate in a manner favourable to the appellant;*

*(j) the award of costs in respect of proceedings before the Appeals Tribunal;*

(k) *the use of the seal of the Appeals Tribunal."* (emphasis added)

**69.** The foregoing puts beyond doubt the Tribunal's power to make rules in respect of, *inter-alia,* the fees payable in respect of an appeal and the waiver, or refund, of such fees, where appropriate.

**70.** It will be recalled that S.57L(2) details what *"must"* be done in relation to an appeal and this includes that an appeal (*per* subsection (2) (c)) must *"be accompanied by the fee (if any) prescribed by the rules".* The reference to "*the rules"* was a reference to the rules made pursuant to and in accordance with section 57AI (in particular, rules made *per* subsection (2)(g) of s. 57AI). I now turn to look at the rules made pursuant to S.578AI which have been referred to in this judgment as the 2008 Rules.

**The 2008 Rules**

**71.** S.I. No. 224 of 2008, which came into force on 1 August 2008, begins in the following terms:

*"Irish Financial Services Appeals Tribunal Rules 2008*

*The Irish Financial Services Appeals Tribunal, in exercise of the powers conferred on it by section 57AI of the Central Bank Act 1942 (inserted by section 28 of the Central Bank and Financial Services Authority of Ireland Act 2003) hereby makes the following Rules- "*

**72.** Rule 1(3) of the 2008 rules states the following:

*"1.(3) These rules contain the procedure which applies in any appeal to the appeals tribunal from an appealable decision and in any application under part VIIA of the Central Bank Act 1942."*

**73.** To pause here for a moment, it is clear from the analysis conducted earlier in this judgment that the appeal which the applicant wished to bring to the Tribunal was, without doubt, from an 'appealable decision' as defined in S.57A of the 1942 Act, as amended.

**74.** Rule 2 of the 2008 Rules is entitled "*Interpretation"* and it makes clear that reference in the 2008 Rules to "*the Act*" is a reference to the 1942 Act, as amended; whereas references to "the 2003 Act" and "the 2004 Act" comprise references to the Central Bank and Financial Services Authority of Ireland Acts, 2003 and 2004, respectively.

**75.** Rule 2 of the 2008 Rules sets out a number of definitions, which include the following:

*" 'appealable decision' has the same meaning as in section 57A of the Act as inserted by section 28 of the 2003 Act and as substituted by section 11 of the 2004 Act) subject to the provisions of section 57G(1A) of the Act (inserted by section 12 of the 2004 Act);*

*'Appeals Tribunal' means the tribunal established by section 57C of the Act and, where the context so admits or requires, the Appeals Tribunal as constituted in accordance with section 57H of the Act for the purpose of hearing a particular appeal;*

*'proceedings' means proceedings before the Appeals Tribunal on any appeal or any application under Part VIIA of the Act;"*

**76.** Rule 3 provides that the forms annexed to the 2008 Rules may be used in proceedings, although any deviation from those forms shall not render any proceedings void. Internal pages 18 to 28, inclusive, of SI 224 of 2008 comprise the forms to be used and these are, in the order they appear annexed to the 2008 Rules:

- *Notice of appeal;*
- *Response to appeal;*
- *Notice of application;*
- *Response to application;*
- *Witness summons; and*
- *Certificate.*

**77.** Earlier in this decision, I referred to the Notice of application, dated 27 May 2020, in which the applicant sought a waiver of the appeal fee. It is a matter of fact that this Notice of application was submitted in the form specified by the 2008 Rules (reflecting the form which can be seen at internal pages 23-24) of S.I. 224 of 2008.

**78.** It is also a matter of fact that the applicant's Notice of appeal, dated 27 May 2020, was submitted in the form annexed to the 2008 Rules (see internal page 19-20 of S.I. 224 of 2008).

**79.** Rule 4 is entitled "*Initiation of appeal*" and begins in the following terms:

*"4.(1) Any affected person may appeal to the Appeals Tribunal from an appealable decision by notice in writing (in these Rules referred to as the "Notice of appeal") sent to the Registrar within 28 days after the Regulatory Authority notified the affected person of the decision concerned, or within such extended period as the Registrar may allow, having consulted the Chairperson (on an application for that purpose being made). The Notice of appeal may be in the appropriate form annexed."*

**80.** The decision against which the applicant sought to appeal was certainly an 'appealable decision' insofar as the 2008 Rules (including Rule 4 (1)) are concerned – Rule 2 having specified that the meaning of that term is the same as in S.57A of the 1942 Act. Thus, nothing turns on the fact that the applicant was not appealing against a decision by a "*Regulatory Authority"*, particularly in light of the explicit right conferred by S.31(1) of the 2009 Act to appeal to the Tribunal against the Assessor's determination as well as what is provided for in S. 31(8) of the 2009 Act.

***81.*** Whereas S. 31(1) of the 2009 Act specifies that an appeal lies to the respondent Tribunal against the Assessor's determination under section 25 of the 2009 Act (and that is, of course, what the applicant sought to appeal, by means of his Notice of appeal, dated 27 May 2020), S. 31(8) goes on to makes clear that references (in Chapter 3 of Part VIIA of the 1942 Act, as amended) to the "*Regulatory Authority*" are to be read as references to the "*Assessor."*

**82.** In the manner previously, explained S. 31(8) also makes explicit that (with the exception of subsections (1) and (4) of section 57L) the provisions of Chapter 3 of part VIIA of the Central Bank Act 1942 apply to an appeal under S. 31 of the 2009 Act.

**83.** As has also been outlined earlier in this decision, S. 57AI (1) of the 1942 Act, as amended, makes clear that the Tribunal has the power to make "*rules"*, not inconsistent with Part VIIA of the said Act, whereas S. 57AI (2) conferred on the Tribunal the power to make rules providing for matters including (*per* subsection (2)(g)) "*the fees payable in respect of lodging appeals with*

*the appeals tribunal*" and (*per* subsection (2) (h)) " *the waiver of fees payable in respect of lodging appeals with the appeals tribunal (whether at the time of lodgement of an appeal or otherwise)".*

**84.** In the manner examined above, the 2008 Rules were made by the Tribunal in exercise of the powers conferred on it by S 57AI of the 1942 Act, as amended.

**85.** The foregoing is fatal to the case the applicant seeks to make in the present proceedings, at the heart of which is the contention that he brought an appeal pursuant to the 2009 Act, not the 1942 Act and, thus, according to the applicant, there is no obligation pursuant to the 2009 Act, to pay any appeal fee; nor, according to the applicant, does the Tribunal have any jurisdiction under the 2009 Act, to require payment of any appeal fee. An examination of the relevant legislation reveals otherwise and to complete the examination it is appropriate to look at what else the 2008 Rules provides.

**86.** I regard myself as bound to reject the applicant's contention that the use of the words "*if any"* in the sentence (in subsection (2) of S.57L of the 1942 Act as amended) which provides that an appeal must *"be accompanied by the fee (if any) prescribed by the rules"* means that, as the applicant put it: "it was open to the Tribunal to make no rules" and that, insofar as an appeal is brought under S.31 of the 2009 Act, "it is not an appeal captured by the 2008 rules". A careful reading of the legislation demonstrates the contrary.

**87.** Rule 5 of the 2008 Rules is entitled *"Fees on appeal"* and it specifies the following:

> *"5. (1) Subject as hereinafter provided, on lodging of a Notice of Appeal, or within 10 days of such lodgement an appellant shall lodge, in the form of a bankers draft, a fee (in these Rules referred to as the "Appeal Fee") of €5,000 with the Registrar. The Registrar may, at his sole discretion on application for that purpose, extend the period for the lodging of the Appeal Fee to a maximum of 14 days from the date of lodgement of the Notice of Appeal.*
>
> *(2) Subject as hereinafter provided, a Notice of Appeal may be struck out by the Registrar if the appellant does not, within the time permitted, lodge the Appeal Fee in the amount and in the form prescribed.*
>
> *(3) Where the appellant considers that the payment of the Appeal Fee would be a cause of serious financial hardship to him and that the requirement to pay the Appeal Fee might be a cause of injustice, he must so notify the Registrar on lodging the Notice of appeal. In such circumstances, the Appeals Tribunal may waive the payment of all or part of the appeal fee.*
>
> *(4) In addition to, and without prejudice to, any order as to costs which it may make, the Appeals Tribunal may direct the refund, in whole or in part, of the Appeal Fee where the proceedings terminate in a manner favourable to the appellant."*

**88.** In the manner explained, an "*appealable decision"* includes a decision of the Central Bank or the Assessor which is declared to be such, for the purpose of Part VIIA of the 1942 Act as amended, by virtue of either such a declaration within the 1942 Act itself, or by means *"of a designated enactment",* which the 2009 Act undoubtedly is.

**89.** For the reasons explained in this judgment, noting turns on the fact that the interpretation/definition section in S. 57A of the 1942 Act appears in Chapter 1 of Part VIIA, as opposed to Chapter 3). Nor does this alter the application of the 2008 Rules to appeals brought under S. 31 of the 2009 Act (such as the applicant's appeal).

**90.** It will be recalled that S. 57A, which I quoted earlier in this judgment, makes clear that the definitions set out in that section apply to the *entire* of Part VIIA and to Schedule 5 of the 1942 Act. Thus, nothing turns on the applicant's claim to the effect that, since S. 31(8) of the 2009 Act does not expressly include Chapter 1 of Part VIIA of the 1942 Act, reliance cannot be placed

on the definitions in Chapter 1 (which states, *inter alia*, that *"'the rules' means rules of the Appeals Tribunal made and in force under section 57AI"*, namely, the 2008 Rules).

**91.** The applicant contends that the Oireachtas deliberately intended to exclude the application of the 2008 Rules to an appeal brought under the 2009 Act. This is wholly undermined by the literal interpretation of the relevant legislation.

**92.** It is perfectly clear from the ordinary meaning of the words used in the relevant legislative provisions that the Oireachtas intended to put in place a mechanism to facilitate an appeal by a person wishing to appeal a decision of an Assessor to the Tribunal. If the applicant was correct, and he is not, it would utterly undermine the intention of the legislature as evident from the plain meaning of the words used in the provisions I have referred to. It would utterly frustrate the intention of the legislature were the very rules governing appeals not to apply to such appeals in circumstances where the tribunal which made those rules in accordance with the powers conferred on it, is the only statutory body to which appeals of the present type may be brought.

**93.** Two fundamental errors underpin the applicant's case. The first is that Chapter 3 of Part VIIA of the 1942 Act must be read in isolation and that the definitions contained in Chapter 1 are of no relevance to Chapter 3 or, for that matter, to any other Chapter in Part VIIA. The second error is that his appeal was brought exclusively under the 2009 Act and that the provisions of the 1942 Act are of no relevance whatsoever to his appeal. These errors mean that the applicant cannot succeed in the present application.

**94.** The reality is that S.31 of the 2009 Act creates (i) a right of appeal in respect of a decision by the Assessor, but that right can only be given expression to, if there is (ii) a statutory body created, to which the appeal can be brought, as well as (iii) a procedure governing how such appeals are to be conducted and determined. In basic terms (i) derives from the 2009 Act, but (ii) and (iii) derive from the 1942 Act and the 2008 Rules made in exercise of the powers conferred on the Tribunal by the 1942 Act.

**95.** An appeal against the Assessor's determination undoubtedly falls within the definition of 'appealable decision' in Chapter 1 of Part VIIA of the 1942 Act (which definitions apply to all Chapters, including Chapter 3).

**96.** The plain meaning of the words used in the relevant statutory provisions fatally undermines the applicant's case. Even if there was any doubt about the fact that the Assessor's determination constitutes an 'appealable decision' to which the 2008 Rules apply (and I am satisfied there is no doubt), the clear intention of the Oireachtas, derived from the ordinary meaning of the words used in the relevant legislative provisions was that someone appealing a decision to the tribunal was expected to pay and appeal fee. One need only look at S.57L of the 1942 Act to see this. Having deliberately *excluded* the application of subsections (1) and (4) of S.57L, the legislature consciously *included* S.57L(2)(c) which requires that an appeal *"be accompanied by the fee (if any) prescribed by the rules".* As examined above, the rules are made under Chapter 3 and without doubt provide for an appeal fee and, it should be emphasised, for the waiver or reduction of such a fee in certain circumstances.

**97.** It can also be said that if the applicant was correct in his interpretation of the various provisions, it would render unworkable the architecture created by the legislation. Mr Lewis gave numerous examples, but the following will suffice.

**98.** There is no dispute between the parties that that section 57N (which is in Chapter 3 of Part VIIA) of the 1942 Act, as amended, applies to his appeal against the Assessor's determination. S.57N is entitled *"Duty of Bank to give reasons on request".* It will be recalled that, by virtue of S.31(8) of the 2009 Act, the word *"Bank"* must be replaced with *"Assessor",* insofar as an appeal of the type the applicant sought to bring, is concerned. Therefore, having made that substitution, S. 57N reads as follows:

*"57N.-(1) If the [Assessor] has made an appealable decision, an affected person may make a written request to the [Assessor] for a statement setting out the reasons for the decision.*

*(2) As soon as practicable, but in any case not later than 28 days, after receiving such a request, the [Assessor] shall prepare a written statement of reasons for the decision and give it to the person who made the request…"*

**99.** It is uncontroversial to say that S.57N cannot properly be understood or applied unless it is permissible to look at the definitions in Chapter 1, (S.57A) including the definition of 'appealable decision'.

***100.*** If, notwithstanding that (*per* S.31(1) of the 2009 Act) the applicant has a right to appeal the Assessor's determination to the Tribunal, that very determination which can be appealed is *not* an 'appealable decision' (within the meaning of S.57A), the absurd outcome is that the applicant is stripped of his rights pursuant to S.57N. Similar comments apply in relation to the provisions of S.57R which is entitled *"Operation and implementation of appealed decision pending determination of appeal".*

***101.*** S. 57V of the 1942 Act (which is also to be found in Chapter 3 of Part VIIA thereof) is entitled *"Procedure of the Appeals Tribunal"* and begins in the following terms:

*"57V.-The Appeals Tribunal may, subject to this Part and the rules determine its own procedure."*

**102.** In the manner examined earlier in this judgment, the Tribunal has, without doubt, made rules in the form of the 2008 Rules. The applicant in the present proceedings argues that the 2008 Rules do not apply to him. As Mr Lewis points out, the inescapable logic of the applicant's argument is that the Tribunal cannot deal with his appeal, in circumstances where the procedure to be followed by the Tribunal must accord, *inter alia,* with the rules the Tribunal has made. Thus, the Tribunal cannot determine its own procedure in respect of the applicant's appeal, because it has made the 2008 Rules which, according to the applicant, don't govern his appeal.

**103.** In a similar vein, Mr Lewis refers to S.57X, entitled *"Power to remit matters to Bank for further consideration".* Having regard to section 31(8) of the 2009 Act, *"Assessor"* can be substituted for *"Bank".* Having made the relevant substitutions in the section itself, the wording begins as follows:

*"57X.-(1) At any stage of proceedings to determine an appeal against an appealable decision, the Appeals Tribunal may remit the decision to the [Assessor] for its reconsideration.*

*(2) The [Assessor] shall reconsider a decision remitted under subsection (1) and on the reconsideration may-*

*(a) affirm the decision, or*

*(b) vary the decision, or*

*(c) substitute the decision for a new decision…"*

**104.** As Counsel for the respondent points out, if the applicant is correct (i.e. that the Assessor's determination in respect of which the applicant has a right to appeal to the Tribunal is *not* an 'appealable decision') the Tribunal does not have the power to remit the relevant decision to the Assessor for reconsideration.

**105.** Section 57Z (also contained in Chapter 3) is entitled *"What decisions the appeals Tribunal can make in determining appeal"* and it begins as follows:

*"57Z.-(1) In determining appeal against an appealable decision the appeals Tribunal shall decide what the correct and preferable decision is having regard to the material then before it, including-*

*(a) any relevant factual material, and*

*(b) any applicable enactment or other law…"*

**106.** If the Assessor's decision, in respect of which an appeal lies to the Tribunal, is *not* an appealable decision, another consequence of the applicant's logic is that S.57Z does *not* apply; and one is left with the absurd situation where the Tribunal is under no obligation to decide what the correct and preferable decision is having regard to the material before it, as regards the applicant's appeal.

**107.** In truth, if the applicant was right - and I am satisfied that he is not - his interpretation would disapply, and exclude from operation, whole swathes of Chapter 3, despite the fact that the Oireachtas explicitly provided that Chapter 3 does apply to appeals of the type he wished to bring against the Assessor's determination (as is clear from S.31(8) of the 2009 Act, the sole exceptions or exclusions being subsections (1) and (4) of S.57L of Chapter 3).

**108.** The inexorable consequence of the interpretation contended for by the applicant is that Chapter 3 does not function at all insofar as an appeal to the Tribunal against an Assessor's determination and the explicit contention made by the applicant is that the 2008 Rules adopted by the Tribunal were "*ultra vires"* and are of no application to his appeal.

**109.** Based on a careful reading of all the legislation this court cannot possibly conclude that the Oireachtas intended to give someone in the appellant's position, the right to appeal a decision by the Assessor to the tribunal, but simultaneously render that right nugatory by disapplying the very structures and processes necessary for that appeal to be determined (being, of course, derived from the 1942 Act and the 2008 rules made thereunder, in the manner examined in this judgment).

**110.** For the reasons set out in this judgment, I am entirely satisfied that 'appealable decision' includes the decision, or determination, by the Assessor to which an appeal lies to the tribunal. As well as being a finding which flows from the literal interpretation of the legislation, it is one which avoids the absurdities which inexorably flow from the interpretation contended for by the applicant.

**111.** I am also satisfied that the applicant cannot succeed in his claim based on the contention that the respondent failed to give adequate reasons. Before proceeding further, it bears repeating that the dispute before this court is exclusively concerned with questions of legislative interpretation. The decision in respect of which the applicant claims that the respondent provided inadequate reasons was the decision not to accept his wholly mistaken view as to what the legislation means. It seems to me that as a matter of first principles it would be inimical to justice if an applicant who was utterly wrong in the interpretation of legislation which he proffered to the decision maker and argued before this court, could nevertheless obtain judicial review on the grounds that the decision-maker did not make sufficiently clear to him why he was utterly wrong in his interpretation.

**112.** The foregoing comments seem to me to apply with even greater force when one looks at the pleadings and submissions made by the applicant regarding the respondent's alleged failure to provide adequate reasons. At paragraph 22 of the applicant's statement of grounds dated 16 September 2020, it leaves the following:

*"The tribunal gave no reasons as to why they considered my supplemental submissions with regard to the obligation to pay the appeal fee as being mistaken and unfounded."*

**113.** At paragraph 73 of the applicant's 12 January 2022 submissions, he states that:

*"As a result of the failure of the Tribunal to give reasons, the Applicant is denied the opportunity to effectively disprove them, deliberately putting the Applicant at a serious disadvantage and putting him in jeopardy."*

**114.** In the manner explained in this judgment, there is simply no question of the applicant ever having been able to (and, thus, having been denied the opportunity to) *"disprove"* what amounted to the correct interpretation of the legislation on the part of the respondent. The foregoing is true regardless of the extent to which the respondent engaged with the various fundamentally flawed submissions proffered by the applicant in the form of his letters dated 15 and 22 June 2020.

**115.** Having made these preliminary but important observations, it is appropriate to note that there is no dispute between the parties with regard to the general principle that the decision-maker is under an obligation to give adequate reasons. Both parties relied on certain passages from the relatively recent and oft quoted Supreme Court judgment of Clarke C.J. in *Connolly v. An Bord Pleanála* [2018] IESC 31. Certain "General Observations" were made by the former Chief Justice from para. 5.1 and, given the emphasis which the applicant laid on these, in particular, on the contents of para. 5.4, I now set these out, as follows:

*"5.1 It is perhaps trite to say that it is very difficult to be specific about the manner in which the obligation to give reasons must apply in different types of situations. This is so not least because the kind of decisions to which the obligation to give reasons applies can vary enormously. Furthermore, the process leading to a decision can differ greatly from one case to the next. Some decisions follow on from a largely adversarial process not entirely unlike that which might occur where a court is required to consider a similar question. Others involve a decision of a regulator who has engaged only with a regulated entity. Some decisions, such as most in the environmental field, can involve the interests of a wide range of persons and the participation of many in the process itself.*

*5.2 Furthermore, the legal requirements which go into different types of decisions may, themselves, vary very significantly from case to case. In certain circumstances a decision maker may be required to determine whether very precise criteria are met. The issue will, therefore, be as to whether those criteria are present, and the reasons which will require to be given will necessarily have to address why it is said that the criteria were, or were not, met. That, in turn, may very well itself require an understanding of the process which led to the decision and the precise issues which were focused on in that process. On what basis was it suggested that the criteria were not met and how did the person concerned suggest that those questions could be answered in its favour? The issues which arise clearly inform the reasoning behind any decision.*

*5.3 However, other decisions involve much broader considerations involving general concepts, and often, to a greater or lesser extent, a degree of judgment or margin of appreciation on the part of the decision maker. Indeed, it may be said that, in the field of environmental law, issues at various points along that spectrum can arise. There may be specific issues as to whether, for example, a particular project conforms to a development plan or guidelines which the decision maker is required to take into account. On the other hand, a decision may also involve a broader question of whether, for example, a proposed development would involve an excessive impairment of visual amenity in a sensitive area. Many other examples could be given. However, the point is that the type of reasons which may be necessary will depend, amongst other things, on the type of decision which is being made and the legal requirements which must be met in order for a sustainable decision of that type to be reached.*

*5.4 In my view it is of the utmost importance, however, to make clear that the requirement to give reasons is not intended to, and cannot be met by, a form of box ticking. One of the matters which administrative law requires of any decision maker is that all relevant factors are taken into account and all irrelevant factors are excluded from the consideration. It is useful, therefore, for the decision to clearly identify the factors taken into account so that an assessment can be made, if necessary, by a court in which the decision is challenged, as to whether those requirements were met. But it will rarely be sufficient simply to indicate the factors taken into account and assert that, as a result of those factors, the decision goes one way or the other. That does not enlighten any interested party as to why the decision went the way it did. It may be appropriate, and perhaps even necessary, that the decision make clear that the appropriate factors were taken into account, but it will rarely be the case that a statement to that effect will be sufficient to demonstrate the reasoning behind the conclusion to the degree necessary to meet the obligation to give reasons."*

**116.** A key principle which emerges from the foregoing is that there is no 'one size fits all' approach to the question of reasons and their adequacy. It also must be emphasised that, in the present case, the decision concerned a very net issue, specifically, whether or not the applicant was right in his interpretation of the legislation. His essential contention was that, on a proper interpretation of the relevant provisions, there is no appeal fee required of him, under any Act or Statutory Instrument. His submissions in that regard comprised his letters dated 15 and 22 June 2020. There is no material difference between the two, insofar as his fundamental contention is concerned, namely, that the Tribunal lacked the power to require payment of an appeal fee. In this, he was entirely wrong. He was wrong then and he is wrong now. The Tribunal told him so, by means of its letter dated 18 June 2020. The Tribunal did not merely state *that* he was wrong in his interpretation, but it took the trouble to explain *why* he was wrong and it is appropriate to repeat *verbatim* paras. 5 to 10 of the Tribunal's 18 June 2020 letter:

> ***1.*** *"The tribunal considers that your assertion is mistaken and unfounded.*
>
> ***2.*** *Your appeal is brought under the provisions of the Central Bank Act 1942(as amended) as applied and adapted to appeals against the respondent Assessor by the provisions of the Anglo-Irish Bank Corporation Act 2009.*
>
> ***3.*** *Section 31(8) of the 2009 Act applies the provisions of section 57L of the Central Bank Act to such appeals subject to the exception of subsections (1) and (4) of section 57L. It follows that subsection (2) is not excepted and is applied.*
>
> ***4.*** *That subsection provides that an appeal must:* "be accompanied by the fee (if any) prescribed by the rules".
>
> ***5.*** *The assertions as to the exorbitant amount or disproportionality of the fee fails to take account of the fact that it's amount in any given case may be reduced or waived entirely.*
>
> ***6.*** *While your letter of 15th June withdraws your application for waiver or reduction of the fee and states explicitly that you will not pay it, in order to give you an opportunity to consider the view of the tribunal as set out in paragraphs 6 – 9 above and to reconsider renewing your application, I will, as registrar, postponed my decision on the striking out of the appeal until 5 PM on Monday next 20 to June 2020. In the absence of a response the appeal will be struck out at that time and the decision will be communicated to the respondent and to the Minister for Finance."*

**117.** In my view, the foregoing reasons were more than adequate. In saying the foregoing, I do not wish to be taken as suggesting that, in circumstances where the applicant was, and remains, wholly mistaken in his interpretation of the relevant legislation, and the decision-maker pointed this out in June 2020, he can nonetheless maintain some sort of 'free-standing' claim against

the respondent arising from an alleged failure on the tribunal's part why he was wrong in the interpretation contended for. Rather, it seems to me that once the applicant failed on the core argument of legislative construction, a subsidiary claim based on alleged inadequacy of reasons fell away. It is lest I be entirely wrong in the foregoing view, that I have engaged with the applicant's claim based on the alleged failure to give adequate reasons and have found it to be wholly lacking merit. In this regard, the following extract from the Supreme Court's decision in Connolly seems to be to be more apposite insofar as dealing with the applicant's claim as regards reasons:

> *"6.15 … it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."*

**118.** The applicant was, without doubt, told at least in general terms why the tribunal took the view it did. Indeed, the applicant was told with specificity. The applicant certainly had sufficient information to consider his options and it is self-evident that he chose to institute judicial review proceedings. Plainly, this court, in considering the present proceedings, was perfectly clear as to the tribunal's reasons for deciding that the applicant was mistaken in the interpretation of the legislation which she contended for.

**119.** On the topic of merit, it needs to be emphasised that the decision in respect of which the tribunal gave its reasons, was *not* a merits-based decision. In other words, and wholly unlike many of the scenarios contemplated in *Connolly,* the relevant decision was not one which the tribunal came to as a result of, say, considering evidence, be that oral or written, and weighing-up different or competing factors, criteria, or interests to arrive at a merits-based decision. On the contrary, the question was purely one of legislative construction. The applicant asserted that the tribunal had no power to require, and that he had no obligation to pay, an appeal fee. This was a binary question. Either the applicant was right, or he was wrong. He was wrong. Nor was this case one involving, say, the decision being one which might impact on the applicant's rights or where the decision-maker had been conferred with a margin of discretion in the context of making a value judgment or merits-based decision. It was, instead, the much narrower question of whether the applicant was obliged to pay the fee which every other would-be appellant was required to pay (subject to the waiver or reduction of same).

**120.** Although not determinative of the question before this court, it also seems appropriate to observe that, on the facts of this case, the Tribunal's Registrar went 'above and beyond' in her efforts to try and persuade the applicant to provide additional detail and/or documentation in support of his initial application that the appeal fee be dispensed. This was in circumstances where there is no doubt about the fact that an appeal fee is payable but, in the manner examined above, it is open to the tribunal to reduce or to waive the appeal fee entirely (see Rule 5 (3) of the 2008 Rules which refers to "*serious financial hardship*" to the appellant / where payment might be "*a cause of injustice*").

**121.** Despite it being open to the applicant to pursue a waiver of the appeal fee he chose, instead, to withdraw his "Notice of Application" for such a waiver. He did so by means of his 15 June 2020 letter, in which he stated *inter-alia* the following:

> *"Provision is made for a waiver of the appeal fee. However, with the requirement to pay a prohibitively expensive appeal fee of €5,000, the requirement to undergo a humiliating,*

*demeaning and degrading process of a means test would be the rule rather than the exception.*

*I would have had no objection to paying a reasonable appeal fee, but I will not put myself through such a humiliating, degrading, demeaning means test process in order to have an Appeal fee of €5,000 waived when in fact it is not legislated for under the jurisdiction of the Act under which this Appeal is brought."*

**122.** Although not determinative of the core question in dispute, it is appropriate to state in the clearest of terms that there is no evidence before this court which would allow for any finding that the tribunal treated the applicant other than with professionalism, patience and respect. Nor is there any evidence which would allow for a finding that the entirely reasonable request made by the tribunal for additional information in support of an application to waive the appeal fee, constitutes a *"humiliating, demeaning and degrading process".* Nor, it must be emphasised, is there anything inherently demeaning or degrading with a means test, something which, it seems uncontroversial to say, can arise in a wide variety of contexts.

**123.** As a matter of first principles, someone seeking a waiver of the appeal fee must do more than simply state that they are unable to pay it and/or that it would be unjust to require it. Rule 5 (3) provides that the Tribunal *"… **may** waive the payment of all or part of the appeal fee"* (emphasis added). The word used is "*may",* not "*shall".* In other words, the tribunal is entitled to exercise discretion. The exercise of discretion self-evidently involves weighing up of relevant matters and coming to a decision. That being so, it seems clear to me that a person seeking the waiver is obliged to furnish the Tribunal with sufficient information, touching on the question (i.e. financial information and/or documentation), so as to allow the Tribunal to give consideration to the matter and to exercise its discretion. This is something the applicant failed (and ultimately refused) to do, contending instead, but in error, that the Tribunal's Rules did not apply to him.

**124.** For the reasons set out in this judgment I am satisfied that the applicant's claim must be dismissed. On 24 March 2020 the following statement issued in respect of the delivery of judgments electronically: *"The parties will be invited to communicate electronically with the Court on issues arising (if any) out of the judgment such as the precise form of order which requires to be made or questions concerning costs. If there are such issues and the parties do not agree in this regard concise written submissions should be filed electronically with the Office of the Court within 14 days of delivery subject to any other direction given in the judgment. Unless the interests of justice require an oral hearing to resolve such matters then any issues thereby arising will be dealt with remotely and any ruling which the Court is required to make will also be published on the website and will include a synopsis of the relevant submissions made, where appropriate."* With regard to the question of costs, my preliminary view is that they should 'follow the event'. In circumstances where the respondent has been entirely successful, whereas the applicant has been wholly unsuccessful, it seems to me that the justice of the situation is met by an order for costs in favour of the successful party and I have not identified any factor circumstances which would justify a departure from what might be called the 'normal rule'. The foregoing is, as I say, my preliminary view. The parties should correspond with each other, forthwith, regarding the appropriate form of final order and, in default of agreement, short written submissions should be filed in the Central Office by the 19th September 2022.