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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY MR STEPHEN CRAWFORD FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE VALUATION APPEALS TRIBUNAL

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KEEGAN J

Introduction

[1] The applicant brings this judicial review against the Valuation Appeals Tribunal in relation to a decision of 30 October 2015. This decision dealt with a series of valuation appeals in relation to pedigree cattle. Leave was granted on 4 April 2016 after a contested hearing before Maguire J. The original Order 53 Statement was then revised to refer to the relevant grounds in the following format:

> "4. The grounds on which the said relief is sought are:
>
> (a) The respondent failed to provide the applicant with a fair and public hearing contrary to the common law and section 6 of the Human Rights Act 1998 as in contravention of Article 6 ECHR in that:
>
> (i) The Tribunal, via one member, carried out impermissible independent research into the facts in issue between the parties.
>
> (ii) The Tribunal, in carrying out independent research, failed to have any, or adequate, regard to the published arrangements for the operation of

such tribunals that limited the information to be considered to evidence presented by the parties.

(iii) The Tribunal failed to make known to the parties, in advance of its use, that information had been obtained in the course of independent research and the precise information obtained.

(iv) The Tribunal employed information found in the course of its independent research to question a witness on a matter in issue without putting that information to the witness and, therefore, acted in a manner unfair to the witness and the applicant.

(v) The Tribunal used information found in the course of the independent research as the basis of its findings of fact without having due regard to the evidence.

(vi) The Tribunal formed a view of the facts based on the independent research prior to the hearing of the evidence.

(vii) The Tribunal failed to take any, or adequate, steps to remedy any unfairness to the applicant arising from the independent research by failing to disclose the same (as set out above) or to exclude such information from its consideration.

(b) The conduct of the Tribunal (particularly that of Mr O'Boyle and Mr Wilson) was such as to give rise to actual or apparent bias contrary to the interests of the applicant."

[2] The applicant seeks to have the impugned decision quashed and he seeks an order remitting the five appeals to a differently constituted tribunal for a fresh hearing.

[3] Mr McMillen QC and Mr McQuitty BL appeared for the applicant. Mrs Murnaghan QC and Mr McAteer BL appeared for the respondent. I am grateful to all counsel for their careful oral and written submissions.

Background

[4] The applicant's case is made in two affidavits dated 1 February 2016 and 24 March 2016. This case was initially of wider expanse including a challenge against the Department of Agriculture and Rural Development ("DARD"). However, after the leave hearing, the grounds were refined. The applicant is a cattle farmer and breeder with a particular expertise in Limousin cattle. He states that his family have been involved in pedigree/specialist cattle farming and breeding for many years.

[5] The applicant's herd suffered a bovine tuberculosis outbreak in 2004. That led to a large number of animals being taken and subjected to compulsory slaughter by DARD. The applicant says that amounted to some 270 animals. When this type of event occurs provision is made in the legislation for a compensation procedure.

[6] The applicant was also the subject of criminal proceedings regarding 11 animals involved in the tuberculosis outbreak. The criminal case was heard over 14 days between October 2008 and February 2009. In those proceedings it was alleged that the applicant had tampered with the animals in contravention of legal provisions. On 6 February 2009 the District Judge made a finding of no case to answer and the charges were all dismissed. This led to judicial review proceedings because compensation for the animals lost during the tuberculosis outbreak was refused on the basis of the criminal charges. The applicant brought a judicial review of that decision which was dismissed at first instance. However, an appeal was determined in favour of the applicant and on 2 December 2012 the Court of Appeal determined that compensation was recoverable.

[7] This case relates to the subsequent Tribunal which was tasked to deal with the level of compensation due to the applicant for the loss of his cattle. The appeals determined by the Tribunal on 30 October 2015 related to 32 particular animals. Some of these appeals were brought by the applicant as herd keeper, namely appeals H and H2. Three appeals were brought by DARD namely appeals D, D2 and D3. I summarise the nature of each appeal as follows:

(i) Appeal H was in relation to six animals. DARD valued the animals but the applicant disputed the valuation. The applicant instructed his own valuer namely a Mr David Thomlinson of Harrison and Hetherington Limited in Carlisle. This appeal was lodged on 9 February 2005.

(ii) Appeal D related to a single animal. A Mr Wallace had provided a valuation which DARD did not accept and appealed to the Tribunal. This appeal was lodged on 18 May 2005.

(iii) Appeal H2 involved 11 animals. DARD provided values which were not accepted by the applicant and so were appealed to the Tribunal. The applicant instructed Mr Thomlinson to give evidence regarding these. An

aspect of this appeal was regarding one specific animal called Jencralodge Utopia. DARD valued this animal at £16,000. The applicant valued this animal at £42,000. This appeal was lodged on 22 November 2006.

(iv) Appeal D2 related to 13 animals valued again by Mr Wallace. DARD appealed to the Tribunal and Mr Thomlinson was also instructed in this matter. The appeal was lodged on 1 February 2006.

(v) Appeal D3 related to one animal valued by Mr Wallace and Mr Thomlinson. Again DARD disagreed with the valuation and appealed. This appeal was lodged on 8 January 2007.

[8] The Valuation Appeal Tribunal was empowered to deal with the compensation issue. The substantive hearing before the Tribunal began on 15 December 2014 and concluded on 19 March 2015 after substantial evidence and submissions. There were various interlocutory hearings which dealt with the dates for hearing, discovery and evidence. Mr Wilson was the independent legally qualified Chair. Mr O'Boyle was a lay member, nominated by DARD, with an interest in or knowledge of agriculture. He is an employee of DARD. He is also termed a technical member and his affidavit of 10 May 2016 sets out his expertise and experience as Head of College Services Branch at the College of Agriculture, Food and Rural Enterprise. Mr Mc Burney was the lay member with farming interests.

[9] Before the hearing commenced, an issue arose regarding the composition of the Tribunal. The applicant avers that by email of 21 May 2014 the Secretariat advised the applicant's solicitor that the dates proposed were no longer convenient to DARD counsel but more pertinently that the Chair of the Tribunal was Mr Stephen Wilson. The applicant avers that in discussing the issue of the Chair with his solicitor he raised various concerns. This was as a result of his solicitor's firm having been involved in a number of cases before Mr Wilson and having directed pre-action protocol correspondence in relation to a judicial review to him.

[10] As a result of these matters a recusal application was made to the Tribunal on 25 June 2014. The application was refused by a decision of 25 of September 2014. This decision was the subject of a hearing where Mr Hunt of counsel appeared and filed a skeleton argument. In the written decision at paragraph 13 it is stated as follows:

> "Mr Hunt modified his written submissions somewhat and acknowledged that there was no evidence on the part of Mr Wilson of actual bias against Walker McDonald, Solicitors, or the clients of Walker McDonald."

[11] Subsequent to this application dated 25 June 2014, the Tribunal received a letter from Walker McDonald, Solicitors, dated 1 July 2014 concerning James O'Boyle

and the perception of bias regarding him as well. There was a further consideration of this issue. The Tribunal decision in relation to this recusal application is detailed and is collectively made by Mr Wilson, the Chair, Mr O'Boyle and Mr Mc Burney. There was no issue raised regarding Mr Mc Burney.

[12] The finding from this hearing was that there was no evidence of actual bias on the part of Mr Wilson against Walker McDonald Solicitors, or the clients of Walker McDonald and that this had effectively been conceded by Mr Hunt. It was determined that there was no reason for Mr Wilson to recuse himself because of a threatened judicial review against a differently constituted Valuation Appeal Tribunal. Also it was determined that there was no evidence of bias in favour of DARD and on a number of occasions DARD's recommendations were not followed by Mr Wilson. The decision states that there was no evidence of any suggestion of animus between Mr Wilson and Walker McDonald, Solicitors. It also stated that Mr Wilson did not know the applicant or have dealings with him.

[13] Regarding Mr O'Boyle, it was decided that none of the allegations had been substantiated. The decision stated that it was some 15 years since the applicant had graduated from Greenmount Agricultural College and Mr O'Boyle had no contact with him in the meantime. This decision stated that a hearing would then proceed.

The Hearing

[14] The subsequent hearing commenced on 15 December 2014 before a Tribunal of Mr Wilson, Mr O'Boyle and Mr McBurney. Full transcripts of the hearing have been provided. The transcripts of 17 December 2014 and 9 February 2015 are particularly relevant regarding this case as they encompass an appeal in relation to one animal named Jencralodge Utopia. It is that appeal that is at the core of this challenge.

[15] The applicant avers that on 17 December 2014 he attended before the Tribunal for the appeal regarding Jencralodge Utopia. This was an animal of particularly high value. The applicant had retained an expert to attend on his behalf, Mr Thomlinson, who it was accepted was a distinguished and experienced expert in the field. Mr Hunt QC represented the applicant and Mr Wolfe QC appeared for the respondent.

[16] At the hearing on 17 December 2014 the applicant and Mr Thomlinson gave evidence regarding the value of Jencralodge Utopia. The applicant gave evidence first and when asked about his purchase of the animal he stated that 'I bought her cheap'. Then Mr Thomlinson gave evidence. The part of his evidence that is at issue is contained at pages 68-73 of the transcript for that date. During Mr Thomlinson's evidence he referred to his assessment of the value of the animal at £35,000. The DARD valuation was £16,000. The applicant had placed a value on the animal of £42,000. Mr Thomlinson also said that in fact he had sold the animal at auction in Carlisle in October 2005 for the sum of 13,000 guineas equivalent to £13,650. In

broad terms, Mr Thomlinson explained this disparity by saying that the vendor selling Jencralodge Utopia at the auction in October 2005 was "not a very popular person" among Limousin breeders and that it was a "difficult day". Mr Thomlinson was cross-examined by counsel for DARD and then the Chair, Mr Wilson, put a series of questions to him which the applicant avers were designed to discredit him. The issue of the difficult day at the auction was not raised in Mr Thomlinson's report and only arose during his evidence. At page 14 of his valuation report Mr Thomlinson referred to the fact that 'this heifer was purchased in Carlisle for 13,000 gns in Oct 05'. In the appendix to his report Mr Thomlinson also refers to 'extra sale reports', a copy pedigree and Limousin Bull sale averages, averages for production sales of heifers, a report from a Limousin dispersal and herd sale averages.

[17] During the evidence of Mr Thomlinson, Mr Wilson asked some questions. A particular passage has been referred to at page 69 of the transcript which reads as follows:

Chairperson	Jencralodge was a dispersal sale, isn't that right?
Mr Thomlinson	It was a production sale.
Chairperson	A production sale my apologies. How many animals was he selling that day?
Mr Thomlinson	I can't tell you.
Chairperson	Was it 10 or was it 100?
Mr Thomlinson	No, just about 20.
Chairperson	A small number?
Mr Thomlinson	A small number. He did have a herd called Jencra which he dispersed.
Chairperson	Are you saying there was a buyers strike that day because they didn't like the cut of this man's jib?
Mr Thomlinson	Correct.
Chairperson	Even though you are saying his animals were super?
Mr Thomlinson	Yes.
Chairperson	We are quite clear about that.

[18] Mr Wilson asked whether there was any press publication of the sale and Mr Thomlinson says there would have been. Mr Thomlinson stated that he did not read the sale reports at the time. It is at this point that Mr Wilson refers to the market report. He referred to a press publication of the sale in October 2005 that had been referred to in the evidence of Mr Thomlinson. Mr Thomlinson queried the question from the Chair and Mr Wilson then stated:

> "I am asking because we know about this animal a little bit. My colleague here on the Panel has a document which has been printed off the internet from limousin.co.uk. It is a page we have found ourselves. You can just read what it says."

[19] There follows an exchange about where the document came from. It then emerges that Mr O'Boyle, the fellow Panel member, had obtained the document from the Limousin society website. The page is entitled 'production sale'. It refers to the sale on 21 October 2005. There are photographs of two heifers. The extract regarding Jencralodge Utopia reads as follows:

> "13,000 gns Jencralodge Heifer leads lively Limousin Production Sale
>
> Sales from 3 pedigree Limousin herds held on Friday 21st October 2005 at Borderway Mart, Carlisle, saw a brisk trade and near total clearance topped by the stylist heifer Jencralodge Utopia when selling for 13,000 gns to an undisclosed buyer. Bidding was keenly fought and reflected the considerable interest generated by buyers from the length and breadth of the UK.
>
> Forming part of a major Reduction Sale on behalf of the Jencralodge Herd of Mr MJ Smith, Manor Lodge Farm, Cocknage Rd, Rough Close, Stoke on Trent, the June 2003 born served heifer Jencralodge Utopia led the trade of 75 catalogued entries. Out of the home bred cow Jencralodge Jodie and by Neutron she was presented in calf to Haltclifee Novel."

[20] It is apparent from the transcript of the hearing that this market report was put to Mr Thomlinson and he commented on it. He stated in evidence that the press report may not accurately reflect what actually happened and he stated that in his view the Limousin Breed Society may not wish to report a poor sale. Mr Thomlinson also said that he would not refer to a bad sale in his report.

[21] Mr Hunt QC complained about the introduction of this report. He asserted that it has been 'bounced' upon the witness. However, Mr Hunt also stated that 'I

have absolutely no issue with you asking questions, or any of the Panel asking questions'. The Chair stated that he had no issue with the integrity of Mr Thomlinson. Mr Thomlinson does not appear to have had a difficulty in answering the questions from the Chair and towards the end of his evidence he stated that "I have no problem at all". The discussion about this issue then ends and there is brief evidence about another animal before proceedings conclude for that day. As a result of these developments the solicitor on behalf of the applicant wrote to the Tribunal requiring a hearing of a recusal application.

[22] This second recusal application was heard on 30 January 2015 and a decision was given on 4 February 2015. This is again a comprehensive judgment. At paragraph 24 the decision states as follows:

> "The Valuation Appeal Tribunal is a creature of statute. It can set its own rules of procedure so long as same are compliant with the rules of natural justice. The Tribunal fully recognises that in the interests of fairness and in order to provide the parties with a fair hearing, the parties are entitled to disclosure of all material held by the Tribunal, and to challenge or otherwise deal with the material as they see fit. Although it is unorthodox for a Tribunal of fact to conduct its own research or make enquiries, the Tribunal is of the view that such investigations having been carried out, so long as the results of those investigations are fully disclosed to the parties, so that they have a full opportunity to test the evidence and to controvert, correct or comment upon that evidence, there is no injury to the concept of fair hearing."

[23] The Tribunal therefore determined that a fair minded and informed observer would not conclude that that there was a real possibility that Mr O'Boyle was biased against the herd keeper or Mr Thomlinson or that there was a real possibility that the Chairman was biased against the herd keeper or Mr Thomlinson. The same position applied to Mr McBurney.

[24] The hearing resumed on 9 February 2015 and concluded on 19 March 2015. On 9 February 2015 the issue of the value of Jencralodge Utopia was returned to by Mr Wolfe. This is at page 3 of the transcript for that day. Mr Thomlinson was asked about a report of the sale which was available in the DARD bundle. This was the report from Harrison & Hetherington, the auction house, who sold the animal in October 2005.

[25] That market report was provided in DARD Appeal Bundle B at page 86. The top of the page refers to 'Jencralodge Sale 21/10/2005. There is also a photograph of the animal and the report reads as follows:

> "Jencralodge heifer tops at 13,000 gns
>
> Two herd disposals and a production sale of Limousin cattle took place at Borderway on Friday 21st October 2005, with prices reaching up to the five figure mark.
>
> At 13,000 gns was Jencralodge Utopia a June 2003 born heifer consigned by Staffordshire breeder Malcolm Smith. One of Malcolm's favourites in the sale, she stood 7th at this years coveted Royal Show in a strong heifer class. Utopia, a Neutron sired heifer and bred from Jencralodge Jodie who goes back to the renowned Uplands Carmine cow, she sold in calf to Haltclifee Novel. Utopia attracted a lot of keen interest and after tense telephone bidding she was sold to an undisclosed buyer."

[26] Mr Wolfe read the report to the witness and he referred in particular to the last sentence of the paragraph which refers to 'keen interest' and 'tense telephone bidding.' There is the following exchange:

Mr Wolfe	So there was keen interest?
Mr Thomlinson	Yes
Mr Wolfe	There was tense telephone bidding?
Mr Thomlinson	Well there was telephone bidding
Mr Wolfe	But it wouldn't be fair to delete the words 'keen interest' and insert the words 'very little interest'?
Mr Thomlinson	No
Mr Wolfe	No?
Mr Thomlinson	But with respect if I may say that as an auctioneer when you are doing a sale, you wouldn't want to put it in a sale that there was no bidders, and it was a terrible bad sale in your reports because that would mean that the next person who was thinking of having a sale with you would go somewhere else because they would get a better price (sic).

[27] The Tribunal delivered a decision in relation to the substance of the case on 30 October 2015. In that decision the Tribunal determined the valuations for the 32 animals at issue. The applicant avers that in each and every respect the Tribunal

found against him in terms of the valuation of the animals at issue. That is the decision which is impugned.

Submissions of the Parties

[28] On behalf of the applicant, Mr McMillen QC augmented his comprehensive written arguments with the following oral submissions which I recite in summary only:

(i) Firstly, Mr McMillen referred me to the legal provisions governing these Tribunals. He referred to the Tuberculosis Control Order (Northern Ireland) 1999 as amended and Article 11A (iii) of that Order providing as follows:

> "Following their consideration of an appeal submitted by the Department or the owner of the animal, the Tribunal shall determine the market value of the animal and such determination shall be final and binding on the Department and the owner."

(ii) Mr McMillen referred to a basic requirement of fairness from both the common law procedural fairness requirements and via Article 6 of the Human Rights Act 1998 as applying to this type of appeal.

(iii) He also referred to the relevant procedural guidance at page 6 which reads:

> "The Panel will consider the facts of the case including all evidence and information that is submitted. If an independent valuation has been carried out it may be in the interest of the case for the independent valuer to attend at the hearing."

Mr McMillen placed further emphasis upon page 7 of the same guidance which includes the following:

> "Both parties will be allowed to hear all evidence presented to the Panel. The Panel has responsibility to ensure that both the herd keeper and the Department are given a fair hearing with the opportunity to present all relevant evidence."

(iv) Mr McMillen extrapolated a number of points from the guidance namely that:

> "The Panel is to determine an appeal only on the basis of the evidence presented to them by the herd keeper and the Department."

He said that this implicitly excludes reliance on or use of evidence gathered by the Tribunal itself. Mr McMillen referred to the fact that the guidance clearly envisages and mandates an adversarial (as opposed to inquisitorial) process and this was, in fact, how the appeals proceeded before the Panel. Also, he submitted that the evidence of any independent valuer, such as Mr Thomlinson, is significant in respect of such appeals. Finally, he referred to the fact that in its own guidance it states that the Tribunal is obligated to provide a fair hearing to both parties and is bound by the rules of natural justice/requirements in procedural fairness.

(v) Mr McMillen stated that parts of the guidance in particular the latter part excerpted from page 71 are incoherent.

(vi) Mr McMillen also argued that a decision of the employment appeal tribunal in the case of East of England Ambulance Service NHS Trust v Sanders [2015] ICR 293 was apposite in this appeal. He said that there were a number of significant parallels between the applicant's case and that of the recited case. That was a case where an employment tribunal, after the hearing of evidence, without notifying the parties, conducted research on the internet in respect of anti-depressant medication. The Panel returned to court and then gave the parties a copy of the information printed off from the internet. The employer objected to the admission of this material but the Panel proceeded to ask the claimant questions about dosage arising out of the internet research. The employer made a recusal application which was rejected and the employer appealed. Langstaff J, the President of the Employment Appeal Tribunal (EAT), allowed the appeal on the basis that the role of the Tribunal was that of adjudicator, not advocate, and that the Tribunal's procedural rules did not permit the Panel to make its own enquiries and then to rely on any material procured in that way. Langstaff J found that the Tribunal's role was not to find evidence to support one or other party's case. It was a procedural irregularity for the Tribunal to have accessed the internet without at least giving the parties the opportunity beforehand to deal with it and ask questions out of the material. The EAT held that while the initial error of conducting the research might have been remediable, since the Tribunal had immediately told the parties what it had done, the Tribunal further erred in assuming the truth of its researches and questioning the claimant as if the material were true thereby demonstrating that it was placing improper weight on the material it had obtained. This failed to show impartiality and that since the Tribunal appeared to an extent to have taken a hostile attitude to the employer, the matter would be remitted to a differently constituted tribunal.

(vii) Mr McMillen relied on the established authority of Porter v Magill [2002] 2 AC 357 in relation to the bias claims made against the Tribunal. He referred to the fact that whether there is actual or apparent bias must be seen through

the eyes of the fair minded and informed observer, having considered the facts of the case.

(viii) In summary, Mr McMillen said that in the circumstances of this case, if the fact of obtaining the research is overcome, the subsequent conduct of the Chair in questioning out of it makes the procedural breach irredeemable and establishes the case made by the applicant in relation to bias.

[29] Mrs Murnaghan QC in her well marshalled written and oral submissions made the following points in summary:

(i) Mrs Murnaghan submitted that the Panel did understand its role.

(ii) In relation to the application Mrs Murnaghan referred to the recusal application of 4 February 2015. She said that all of the questions arising from this application can be resolved by considering and answering the single question: was the tribunal right not to recuse itself by the decision of 4 February 2015?

(iii) Reference was made to the document which was found by Mr O'Boyle from the Limousin Society. A number of points were made in relation to this. Firstly, it was pointed out that this was a document from the Limousin Society. It was a one page document in relation to the sale that took place in October 2005. It was noted that this impugned document was the market report which was published by the Limousin Breed Society website. In the parties' bundle was a similar report which had been published by Harrison and Hetherington, and which replicated to a great extent the report obtained by Mr O'Boyle. Mrs Murnaghan pointed to a comparison between the two documents which revealed that in the report from Harrison and Hetherington which had been in the bundle "the keen interest" and "tense telephone bidding" was stated. She argued that this was not substantially different to the Limousin Breed Society website report that noted "bidding was keenly fought and reflected the considerable interest generated by buyers from the length and breadth of the UK". Mrs Murnaghan made the further point that the expert was able to deal with the document. She referred to the fact that his written report had not referred to the problems with the sale day. However, she argued that the Chair's questioning did not impugn the integrity of the expert in any way and that this market report was unremarkable.

(iv) Mrs Murnaghan sought to distinguish the Sanders case on the facts.

(v) Counsel referred to the fact that the context of this case was important. Frankly, Mrs Murnaghan said that it was irregular as to how this document was used but she questioned whether or not this would have invalidated the whole process. In essence Mrs Murnaghan said that even though the use of

the document may have been unorthodox it did not infect the process and it had no bearing on the final decision. As such reliance was placed on the dicta of McCloskey J in R v Jones [2010] NICC 39 and the case of Doody v Secretary of State for the Home Department [1993] 3 All ER 92. Counsel also referred to the fact that in consideration of the applicant's complaint of procedural unfairness, the court should be mindful of the nature of the Tribunal, the subject matter of the procedures and the circumstances generally. Reliance was placed on the case of Brooks R (On the application of) v Parole Board and Another [2003] EWHC 1458 at paragraph 34 where Mr Justice Elias said:

> "Fairness is a matter for the court but that nonetheless great weight should be given to the Tribunal's own view of procedural fairness."

(vi) Mrs Murnaghan referred to the nature of this Tribunal and the fact that Mr O'Boyle was an expert assessor who would be expected to have some knowledge in relation to the issue of valuation and sales. She also referred to the fact the applicant was represented, he had his own expert, and there was a process of evidence over a considerable period of time during which he was able to deal, and his expert was able to deal, with the sale report.

[30] Mr McQuitty BL replied on behalf of the applicant and he made a number of submissions to me which repeated the applicant's points. Mr McQuitty was also at pains to point out that the applicant did not accept the recusal decision however he submitted that it was appropriate for the applicant to bring a challenge at the end of the process when a decision had been made rather than after the recusal determination. Mr McQuitty also stressed that notwithstanding the affidavits filed by the respondents the issue of bias is in the mind of the onlooker. It is not enough for the decision maker to say that he or she was not biased.

Legal context

[31] The legislation upon which the Valuation Appeal Tribunal can determine an appeal in relation to the valuation of animals is the Tuberculosis Control Order (Northern Ireland) 1999 as amended. The Tribunal is a decision maker exercising a judicial function. There is no appeal from any determination made. In terms of procedure, two documents are of relevance. Firstly, there is the document entitled "Guidelines for Herdowners on the Process of Valuation of Animals to be Slaughtered due to Tuberculosis or Brucellosis". This sets out the process for making an application.

[32] A further document is entitled 'Tuberculosis and Brucellosis Valuation Appeals Panel, Appeals Procedure'. This leaflet provides a guide to the appeals procedure for resolving disputes about the market value of cattle under the Tuberculosis Control Order (Northern Ireland) 1999 as amended and the Brucellosis Control Order (Northern Ireland) 2004 as amended.

At page 6 under the heading 'how does the Panel operate?' it is stated:

> 'The Panel will consider the facts of the case including all evidence and information that is submitted…'

At page 6 it is also stated:

> "The Panel's role is to review the facts and make a decision based on the evidence presented to them. It is considered that the make–up of the Panel will provide sufficient knowledge to enable a determination on the market value of the animals to be made on the merits of the evidence presented."

[33] Under the section 'can I be present at the Panel review?' it is stated:

> "Both parties will be allowed to hear all evidence presented to the Panel. The Panel has responsibility to ensure that both the herd keeper and the Department are given a fair hearing with the opportunity to present all relevant evidence. Should either party wish to challenge the evidence provided by the other side it would be in the interest of the smooth running of the appeal hearing that the Panel or the Chair if authority has been given and recorded will rule on objections to questions or where the cross examination in the opinions of the Panel becomes irrelevant or offends against the principles of natural justice. The Panel will then consider the issues and reach a conclusion."

[34] The case is made against the decision maker on the basis of an alleged breach of procedural fairness which also offends Article 6 of the European Convention on Human Rights ("ECHR") and on the basis of bias. These grounds are overlapping and the argument before me reflected that reality. This broad category of fairness has also been described as comprising rules of natural justice. That encompasses two accepted legal norms namely the right to be heard and the rule against bias. This case involves a consideration of both concepts.

[35] There are a number of elements contained within the duty to be fair. To what extent each applies depends on 'the character of the decision making body, the kind of decision it has to make and the statutory or other context in which it operates' per Lord Bridge in Lloyd v McMahon [1987] AC 625.

[36] In a recent case of Galo v Bombardier 2016 NICA 25 the Court of Appeal in Northern Ireland reiterated the core principles of fairness in a case in relation to proceedings before an industrial tribunal. Gillen LJ refers to the obligation of every tribunal and court to act fairly. He refers to the fact that this principle of fairness was most recently and authoritatively dealt with in R (Osborn) v Parole Board and Others [2014] AC 1115. At paragraphs 48-50 Gillen LJ adopts the analysis of Lord Reed in that case which he says is of wide application.

[37] This case involves a tribunal made up of a legally qualified member and two lay members each of whom bring their own expertise and knowledge. As such it is similar to tribunals dealing with other areas of law. The case of Gillies v Secretary of State for Work and Pensions [2006] UKHL 2 provides an apt exposition of the particular position of Tribunal members. In that case a challenge was brought to the impartiality of the medical member of a tribunal. This challenge was unsuccessful. Lord Hope states as follows:

> "22. One of the strengths of the tribunal system as it has been developed in this country is the breadth of relevant experience that can be built into it by the use of lay members to sit with members who are legally qualified. In *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 15 Hale LJ (as she then was) paid tribute to the fact that specialist tribunals, chaired as they usually are by a lawyer, have an appropriate balance of experience and expertise amongst their members.'
>
> 23. The fact is that the bringing of experience to bear when examining evidence and reaching a decision upon it has nothing whatever to do with bias. The purpose of disqualification on the ground of apparent bias is to preserve the administration of justice from anything that might detract from the basic rules of fairness."

[38] In terms of procedural fairness, there are well established concepts at play in this case. These include the opportunity to respond, the fact that decision makers must take into account material submitted, the issue of disclosure of material available to the decision makers and the issue of decision makers not relying on their own private enquiries. These matters are discussed in Chapter 11 of Supperstone, Judicial Review, 5th edition.

[39] There is also an issue about a potential breach of the guidance governing the operation of this particular tribunal. This does not have statutory force however the guidance is an important statement of best practice. A departure from best practice does not however automatically result in a finding of unfairness. The authority of R v Secretary of State for Home Department ex parte Doody [1994] 1 AC 531 refers to

this. In that case Lord Mustill referred to the contextual nature of the assessment of fairness. This involves what the courts have described as an 'intuitive judgment'. Lord Mustill also states that:

> "Conversely, the respondents acknowledge that it is not enough for them to persuade the court that some procedure other than the one adopted by the decision maker would be better or more fair. Rather, they must show that the procedure is actually unfair. The court must constantly bear in mind that it is to the decision maker, not the court, that Parliament has entrusted not only the making of the decision but also the choice as to how the decision is made."

[40] The law disqualifies a decision maker from adjudicating whenever circumstances point to a real possibility that the decision may be pre-determined either because of:

(a) doubts regarding personal connections or pre-disposition which raise doubts as to impartiality; or

(b) an institutional setting of decision making which is not independent.

[41] The Article 6 ECHR provision states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[42] De Smith on Judicial Review states at paragraph 10-005:

> "Insofar as the common law test of bias previously differed from the ECHR test, necessary adjustments have in most respects been made and it has been claimed that nowadays there is 'no difference between the common law test of bias and the requirement under Article 6 of the Convention of an independent and impartial tribunal'."

[43] The adjudication of such an issue must begin by considering the issues of actual bias and the appearance of bias. Actual bias results in automatic disqualification. The appearance of bias does not result in the same automatic disqualification. The categories which are argued in relation to appearance of bias appear to fall into two groups:

(i) If the decision maker has an interest in the proceedings which is of a direct financial or proprietary interest in the outcome. The first class of case is sometimes referred to as presumption or presumed bias.

(ii) The second class is where any financial or proprietary interest is indirect or where there is no financial or proprietary interest at all but nonetheless the surrounding circumstances give rise to a real possibility of lack of impartiality. In such a case disqualification is not automatic and depends on the context of the case.

[44] The test to be applied in relation to apparent bias is found in the case of Porter v Magill [2001] UKHL 67 paragraph 103 in the speech of Lord Hope where he says:

> "The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility … that the tribunal was biased."

[45] The issue of the fair minded and informed observer is explained by Baroness Hale at paragraph 39 of the Gillies case where she says:

> "The 'fair minded and informed observer' is probably not an insider (i.e. another member of the same tribunal system). Otherwise, she would run the risk of having the insider's blindness to the faults that outsiders can so easily see. But she is informed. She knows the relevant facts. And she is fair minded. She is, as Kirby J put it in Johnson v Johnson [2000] 200 CLR 488, 'neither complacent nor unduly sensitive or suspicious'."

[46] This case involves the second category where disqualification is not automatic and depends upon context. The reviewing court must first ascertain all the circumstances which have a bearing on the allegation of bias. It must then ask itself whether the test for bias is satisfied applying the objective test. A fair minded and informed observer will adopt a balanced approach. A reasonable member of the public is neither complacent or unduly sensitive or suspicious. It is also correct that what the public was content to accept formerly is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case in the past. This modern approach has been approved in many cases and by the House of Lords in Lawal v Northern Spirit Ltd [2003] ICR 856 and by the Privy Council in AG of Belize v Belize Bank Ltd [2011] UKPC 36.

Consideration

[47] I remind myself that I am not determining the substance of the case within these judicial review proceedings. I am determining the lawfulness of the decision making process. The questions for determination in this case relate to the conduct of Mr O'Boyle in conducting his own researches regarding the value of Jencralodge Utopia and how that information was adduced and used during the currency of proceedings. These are the issues which require careful examination by the reviewing court. The issue is whether the conduct is capable of establishing bias or apparent bias on the part of the decision making body and/or offends the common law and ECHR principles of procedural fairness such as to render the decision unlawful. These issues are overlapping however the context is common to both.

[48] I summarise this as follows. The issue was valuation of pedigree cattle. The applicant had lawyers representing him and a tribunal hearing took place over seven days. The tribunal comprised three members. One was a technical member with an expertise in this area who is a DARD nominee. The papers contained a short market report from the auctioneer which referred to the sale. The technical member also accessed the official Limousin website in relation to market value. This person did not share that report with the other tribunal members or the parties. He passed it to the Chair when the issue arose in evidence. The Chair introduced that report and questioned the applicant's expert out of it. The expert was not uncomfortable about that. The applicant's lawyer made a complaint. A recusal hearing then took place. The document was disclosed and three more days of hearing took place.

[49] In terms of procedural fairness, the appeals procedure of the Tribunal refers to the fact that it will consider the facts of the case including all evidence and information that is submitted. These are not legal rules but they are nonetheless important as they provide an expectation of the standards of decision making to be applied. The procedure also refers to the fact that the Panel will decide on the evidence presented to it. It refers to the make-up of the Panel providing sufficient knowledge to enable it to do that. It has been argued that the actions of Mr O'Boyle offend the procedure. In my view this requires consideration of the fact of his obtaining the market report, a failure to disclose the report in advance of hearing and the questioning that took place as a result of the report. These questions also bear on the issue of bias to which I will return.

[50] There is no express prohibition in the rules in relation to the obtaining of the market report. The issue is whether it is implicit. In Sanders the court found that the relevant Rule, Rule 41 of the Employment Tribunal Rules of Procedure did not allow a Tribunal to make enquiries on its own behalf into evidence which was never volunteered by either party. It seems to me that this principle has universal application to tribunals and decision makers because it accords with the need for transparency in decision making. It is clearly best practice. However, the issue

whether any breach of the principle is unfair depends on the facts of each case. In the Sanders case the internet researches which took place after the evidence were found to be of 'dubious relevance'. The situation is different in this case in my view where the technical member has checked the official website regarding valuation.

[51] In the circumstances of this case where there was such a disparity between the applicant's valuation of Jencralodge Utopia and the DARD valuation, it seems to me understandable that Mr O'Boyle would check the market report. This was a report of the sale conducted by the applicant's expert 11 months before his valuation. Mr O' Boyle avers to this in his affidavit of 10 May 2016 in particular at paragraph 9 and 10 where he states that he refers to the Limousin website regularly in his work updating his knowledge of pedigree Limousin cattle. This is akin to an estate agent checking the market value of a property at a particular time.

[52] In my view the mischief behind the appeals procedure is to prevent a situation arising where the decision maker tries to determine questions of fact by researching and finding opinion evidence to assist a particular litigant. This has been expressed as a situation where the adjudicator becomes the advocate for a litigant. That was the position in the Sanders case. By contrast, the information in this case was a public record in relation to the circumstances of sale. It was also almost identical to the market report provided by the auctioneers which was in the bundle of papers prepared for the hearing. The Sanders case is an example of the perils that can ensue from a Tribunal losing sight of its role as independent adjudicator. However, in this case the circumstance of Mr O'Boyle obtaining a market report cannot attract the same censure.

[53] In this case the real difficulty arises in relation to disclosure of the material. I consider that care should have been taken to provide any such documentation in advance of the hearing to the parties. It would clearly have been wise to disclose the market report obtained by Mr O'Boyle in advance of the hearing. In my view this principle should apply to all members sitting on tribunals. However, I do not consider that this failure invalidates the entire decision making process. I note that four days of hearing took place before the document was introduced and three days took place after it was disclosed. During the second set of hearing days the matter was returned to.

[54] In this respect the contextual setting is important. Firstly, the market report was not extensive. Crucially, there was also a similar although not identical document in the papers. That market report emanated from the expert on behalf of the applicant who was involved in the sale. The tribunal member with expertise in this area is criticised for checking the Limousin Society for the price of the cow at the sale. However, he might be criticised for not knowing the market history given his expertise. The report in this case is very different from medical opinion which was extracted from the internet in the Sanders case. Indeed, it follows as a matter of common sense that medical information on the internet comes with a serious health warning.

[55] Mrs Murnaghan has characterised the procedure as unorthodox (as the Tribunal itself did) however, she says that any procedural irregularity was remedied by the fact that the information was shared when produced, that lawyers were part of the process, that the expert being questioned appeared comfortable, and that it did not affect the result. I consider that all of these points have force when considering issues of procedural propriety. In my mind the conduct of the Tribunal in this regard does not offend the principles of fairness because ultimately the applicant was able to respond to the information having had sight of it during the hearing. If I stand back and look at this case in the round I cannot conclude that a case of unfairness is made out and I consider that this breach of procedural propriety was remedied.

[56] In terms of the questioning from the Chair, I do not consider that it changed the entire proceedings from adversarial to inquisitorial. I consider that the Chair and the nominated members who bring their own expertise cannot be expected to sit and act in a vacuum in determining this type of case. This proposition is accepted in the papers. The issue is whether the questioning oversteps the mark and that must depend on the facts of each case. I do not consider that this case falls into the cases such as Yuill v Yuill [1945] P 15 or Jones v National Coal Board [1957] 2 QB 55 or Sanders. In this case, upon reading the transcript and the applicant's expert evidence, I consider that the Chair was entitled to test the evidence. Indeed, there is a large question mark over the content of the expert report which did not mention the circumstances of sale yet placed a high valuation on an animal sold 11 months previously. I consider that Mr Thomlinson was equipped and able to deal with the questioning. I do not consider that the Tribunal has substituted its own argument as per the dicta of Langstaff J referred to me by the applicant from the Sanders case and Dundee City Council v Malcolm UKEATR/0019/15.

[57] Having read the judgment, I also consider that the issue has been properly weighed up in the context of this case. I bear in mind that three members decided this case including Mr McBurney who represented farming interests and against whom no claim of bias is levelled. Mr McBurney is described as a retired management consultant. I note the factors that the Tribunal considered in determining the market value of each pedigree animal. This includes the official sales records and show history of the animal and its progeny. At paragraph 15 of the judgment the evidence of Mr Thomlinson is recited and the Tribunal states that 'he has very considerable experience in livestock sales having been in the business for 52 years'. At paragraph 20 the Tribunal notes that Mr Thomlinson did not see the animals which placed him at a significant disadvantage in terms of valuation. At paragraph 22 the Tribunal noted that the applicant's herd won the large herd category of the Limousin breed competition in Northern Ireland on a number of occasions. The Tribunal then deals with each appeal in detail. Paragraphs 122-129 of the judgment deal with the animal, Jencralodge Utopia, who was part of Appeal H2. The Tribunal assessment is given at paragraph 129. In my view this is a

balanced assessment taking into account all of the evidence including that of Mr Thomlinson.

[58] I then turn to the case made in relation to bias. The charge of actual bias against a decision maker is serious. Mr McMillan rightly did not press this argument to any great extent. I cannot see that the argument is made out on the facts of this case in any event. However, a robust argument was made regarding apparent bias and that requires further consideration. To answer this it is important to isolate what the objective observer is being asked to assess. The exercise is twofold because firstly the relevant factual matrix must be established. I have referred to this at paragraph [48].

[59] I accept the assertion that the applicant did not agree with the second recusal decision. I accept that his continuing with the Tribunal hearing does not amount to tacit acceptance. I also accept that the denials of bias by the three Tribunal members made upon affidavit are not determinative upon me. I have conducted my own review of the actions of the Tribunal, looking at all of the facts, applying the objective test.

[60] The overriding question is what would the fair minded and informed observer say on the facts of this case? Firstly, he or she is being asked to look at the situation where a tribunal member, with a particular expertise, obtained the market report for the sale of an animal under adjudication from the official website of the specialist breeder's society. Does that satisfy the test of apparent bias? Secondly, the fair minded and informed observer is asked to consider the fact that the report was not shared prior to evidence being called. It was introduced by the Chair during cross-examination of the applicant's expert and the Chair asked questions flowing from it. Does that satisfy the test of apparent bias/procedural fairness? Thirdly, what would the objective fair minded observer think of a Chair at the tribunal using a document in the course of evidence and questioning out of it. Would that person think that the Chair had a view against the claimant as a result of his actions? The test is an objective one. Apparent bias does not depend upon proof of prejudice rather it is concerned with public perceptions.

[61] The case of East of England Ambulance Service NHS Trust v Sanders [2015] ICR 293 has been cited as a strong authority in favour of the applicant. That was a tribunal case which involved independent research. However, on close analysis, it appears to me that this case is distinguishable from the Sanders case. In that case the applicant was unrepresented. The Tribunal was found to have taken steps which effectively made a case for the applicant which was hostile to the employer. The information was from unreliable sources. The pursuit was after the evidence had been called and behind closed doors. Paragraph 40-46 of the judgment sets out the particular context of that case.

[62] In terms of Mr O'Boyle, I cannot see that there is a real possibility of bias on the facts of this case. I say this particularly as he was the member of the Tribunal

with a knowledge and expertise in assessing the valuation of cattle and because the market report he obtained was so similar to the auctioneer's report. I then turn to the position of the Chair and I have to consider whether his actions establish a real possibility of bias applying the objective test. On the facts of this case, I cannot see that the informed and fair minded observer would conclude that the actions of the Chair amounted to bias. I bear in mind the affidavit of Mr Wilson of 10 May 2016 at paragraph 8 whereby he states that he did not have the document in advance. However, it was not new information. It was from a reliable official website. It replicates the sale report filed by the auctioneer. The applicant's expert was able to deal with it and felt no discomfort in doing so. The informed observer would appreciate that the question had to be asked as to why a higher value was placed on the animal in question than the amount paid for it at the sale. It seems to me that this was an area that had to be tested in the tribunal arena. This was the 'elephant in the room' which in my view could not be left unresolved.

[63] Drawing together all of the above, in terms of the specific grounds relied upon, I conclude as follows:

(i) It is correct that Mr O'Boyle obtained a market report by his own independent researches and it was only disclosed during the hearing. This did not accord with the appeals procedure. However, I consider that the procedural irregularity did not invalidate the entire decision making process because I consider that the error was remedied and the applicant was afforded an opportunity to comment upon it.

(ii) I consider that the market report was sufficiently similar to the Harrison & Hetherington report in the papers that it did not offend the spirit of the published arrangements for the Tribunal. This was not new evidence and the issue of whether or not there was keen interest in the sale is referenced in both the Limousin report and the Harrison & Hetherington report. Valuation evidence was volunteered by the parties.

(iii) I agree that the report was not disclosed in advance and that that was improper but I consider that the position was remedied during the hearing.

(iv) I do not consider that there was any unfairness occasioned to Mr Thomlinson and that is apparent from the transcript.

(v) I do not consider that the findings of fact are invalidated in any way and that they were based upon the evidence. The Tribunal did not place improper weight upon the Limousin report. It was relevant to the issue of valuation of one of 32 animals. It was considered as part of the evidence and the Tribunal formed its own view.

(vi) I do not consider that it has been established that the Tribunal took a view of the facts based on the report prior to the evidence. This proposition is illogical given that only one member saw the market report prior to hearing.

(vii) I reject the assertion that the Tribunal failed to take any or adequate steps to remedy any procedural defect given the approach adopted of subsequent disclosure and testing of the market report in evidence.

Conclusion

[64] In relation to ground (a) I do not accept that the respondent failed to provide the applicant with a fair and public hearing contrary to common law and Article 6 of the ECHR. In relation to ground (b) I do not consider that the applicant has established a case of actual bias or apparent bias applying the objective test of the informed and fair minded observer.

[65] Accordingly, I dismiss the application on all grounds.