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Judgment: approved by the Court for handing down | *Delivered:* **01/06/2009**
*(subject to editorial corrections)**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL BY WAY OF CASE STATED

IN THE MATTER OF AN APPEAL AGAINST VALUATION FOR RATING PURPOSES
AND
IN THE MATTER OF THE RATES (NORTHERN IRELAND) ORDER 1977

BETWEEN:

IAN WILSON

Appellant/Respondent;

-and-

THE COMMISSIONER OF VALUATION

Respondent/Appellant.

Before: Higgins LJ, Girvan LJ and McCloskey J

HIGGINS LJ

[1] This is an appeal by way of case stated from a decision of the Lands Tribunal (Mr Michael Curry, Member) dated 23 June 2006 whereby it was determined, on appeal from a decision of the Commissioner of Valuation, that the respondent's house at 217, Ballynahinch Road, Ballykeel, Dromore, County Down, was a farmhouse occupied in connection with agricultural land and used as the dwelling of a person whose primary occupation is the carrying on or directing of agricultural operations on that land.

[2] The respondent's house is a detached chalet bungalow with a converted roof space and a garden. The house is bounded by the family farm extending to 36 hectares, now owned and farmed by the respondent. The house was built in 1979 and first entered in the Rating List in 1981 as a private dwelling (HOG). On 23 August 2005 the Commissioner of Valuation declined to alter the Listing so as to distinguish the house as a farmhouse (HAG) under

the provisions of Article 39 and Schedule 12 Part II of the Rates (Northern Ireland) Order 1977. The respondent appealed that decision to the Lands Tribunal on the ground that he was registered with the Inland Revenue as a full-time farmer. The Lands Tribunal ruled that the house was occupied in connection with agricultural land and used as the dwelling of a person whose primary occupation was the carrying on or directing of agricultural operations on that land. The effect of this was to reduce the NAV of the herediditament from £460 to £420.

[3] The Commissioner of Valuations applied to the Lands Tribunal that a case be stated for the opinion of the Court of Appeal on six points of law. The Member in stating the case has, without objection, reformulated the questions as follows -

a) Was I correct in law in including qualitative as well as quantitative assessments;
b) Was I correct in law in including a consideration of which of Mr Wilson's occupations was of primary concern or importance;
c) Was I correct in law in including a consideration of Mr Wilson's occupations objectively but in terms of primary concern or importance to him;
d) Was I correct in law in concluding that so far as this latter consideration was concerned, Mr Wilson's occupation as a farmer of the subject lands far outweighed his occupation with the Council and
e) Was I correct in law in concluding that, in all the circumstances, Mr Wilson's primary occupation was the carrying on or directing of agricultural operations on the land.

[4] The respondent took over farming the land on the death of his father in 1996. His mother died in 2002. The respondent is employed by Lisburn City Council as an Assistant Director for Environmental Services with responsibility for Planning and Building Control matters. He is required to work 37 hours per week Monday to Friday with flexible hours between 0700 and 12 midnight. His salary scale is £35,000 - £40,000 and the post is pensionable. He also works on the farm as a self employed farmer usually early in the mornings, late evenings and at week-ends, averaging about 40 hours per week. He is assisted by his wife.

[5] Article 39 of the Rates (Northern Ireland) 1977 (the 1977 Order) provides -

"Basis of valuation

39.—(1) For the purposes of this Order every hereditament shall be valued upon an estimate of its net annual value.

(2) Without prejudice to any other statutory provision, [but subject to Articles 39A and 39B,] Schedule 12 shall have effect for the purpose of providing for the manner in which the net annual value of a hereditament is to be, or may be, estimated, and the other provisions of that Schedule shall have effect.

(3) Where any provision of Schedule 12 empowers the Department to make an order modifying any other provision of the Schedule or providing for the method by which the net annual value of any hereditament is to be determined, the order—

(a) may contain such incidental, supplemental and transitional provisions as the Department considers necessary or expedient, including provisions modifying this Order;

(b) shall be made only after consultation with any association which appears to the Department to be representative of district Councils or, where the order affects only the district of a particular Council, after consultation with the district Council which appears to the Department to be concerned; and

(c) shall be subject to affirmative resolution;

and an order providing for the method by which the net annual value of any hereditament is to be determined may provide for determining that value by the application of different methods of valuation to different parts of the hereditament."

Schedule 12 provides -

"SCHEDULE 12
Articles 39, 50
BASIS OF VALUATION
PART I - GENERAL RULE

1. Subject to the provisions of this Schedule, for the purposes of this Order the net annual value of a hereditament shall be the rent for which, one year with another, the hereditament might, in its actual state, be reasonably expected to let from year to year, the probable average annual cost of repairs, insurance and other expenses (if any) necessary to maintain the hereditament in its actual state, and all rates, taxes or public charges (if any), being paid by the tenant.

2. - (1) Subject to sub-paragraph (2), in estimating the net annual value of a hereditament for the purposes of any revision of a valuation list, regard shall be had to the net annual values in that list of comparable hereditaments which are in the same state and circumstances as the hereditament whose net annual value is being revised.

(2) Sub-paragraph (1) shall not apply to any hereditament for whose valuation special provision is made by or under Part IV or any of the succeeding Parts of this Schedule, or to any hereditament whose net annual value falls to be ascertained by reference to the profits of the undertaking or business carried on therein."

PART II relates to Farmhouses and is in these terms –

"1. The net annual value of a house occupied in connection with agricultural land or a fish farm and used as the dwelling of a person-

(a) whose primary occupation is the carrying on or directing of agricultural or, as the case may be, fish farming operations on that land; or

(b) who is employed in agricultural or, as the case may be, fish farming operations on that land in the service of the occupier thereof and is entitled, whether as tenant or otherwise, so to use the house only while so employed, shall, so long as the house is so occupied and used, be estimated by reference to the rent at which the house might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as aforesaid.

2. The capital value of a house occupied and used as mentioned in paragraph 1 shall be estimated on the assumption (in addition to those mentioned in Part I) that the house will always be so occupied and used."

[6] As summarised in the case stated 'the issue that fell for determination was whether the house was used as the dwelling of a person whose primary occupation was the carrying on or directing of agricultural operations on the land'. Essentially the question to be decided was whether Mr Wilson's primary occupation was that of farmer or Council employee. The Member concluded that the hereditament should be entered in the Rating List as a farmhouse as defined by the 1977 Order. At paragraph 9 he set out his findings –

"9) In considering whether Mr Wilson's primary occupation was the carrying on or directing of agricultural operations on the land:

a) It was accepted that the term *occupation* must be given the non-technical meaning of 'that which engages the daily time and the attention of a person';

b) Among other things I held that the ultimate issue is a question of balance that requires an objective inference to be drawn from the facts. It is a personal test that depends on the particular circumstances of each individual and goes beyond an analysis of the day-to-day carrying on or directing of the operations to include a question of which occupation is of primary concern or importance. It requires a qualitative as well as a quantitative assessment and the relative time devoted to each or the financial returns or relative contribution to the livelihood may not be the only measure;

c) I heard evidence of the time Mr Wilson devoted to each occupation; of priority in allocation of his availability; of his gross salary from off the farm and his gross income from the farm. I concluded that on these factors alone the balance would lean

towards not treating farming as his primary occupation;

d) I heard other evidence more personal to Mr Wilson. I accepted his evidence that he took the job at the Council out of necessity. I found that he had a genuine interest in and an exceptional commitment to the farm that was not matched by any corresponding commitment to a career with the Council. I concluded that in terms of which was of primary concern or importance to him, but viewed objectively, his occupation as farmer far outweighed his occupation at the Council; and

e) I found that was sufficient to tip the balance in favour of treating farming as his primary occupation."

[7] It was not in dispute that the dwelling was occupied in connection with lands which were used for agricultural purposes. What was disputed was that the hereditament was used as the dwelling of a person whose primary occupation was the carrying on or directing of agricultural operations on that land. It was submitted by Mr Shaw QC who, with Mr McAllister, appeared on behalf of the appellant, that although the Tribunal had correctly stated the test to be applied, it had erred both in its approach and its conclusion that the respondent's primary occupation was that of a farmer rather than an employee of Lisburn City Council. In a case in which the respondent has two occupations the Tribunal must decide which is the primary occupation. In doing so the Tribunal should ascertain the facts and then, following the decision in McCoy v Commissioner of Valuation 1989 VR/35/1988 , ask, in an objective manner, "What is the respondent's job? What engages his daily time and attention? Upon what business does he normally engage every day?" It was submitted that the Member appears to have recognized at paragraph 11 of the Written Decision that farming was not the primary occupation of the Respondent upon an objective assessment of 3 factors, namely:

a) The time he devoted to his job at the City Council compared to farming;
b) The priority in allocating his availability to the Council rather than the farm;
c) His income from the Council compared to his income (indeed loss) from the farm.

However it was submitted that he fell into error by admitting and making use of subjective elements in his assessment of which of the two occupations was primary. He took account of "other evidence more personal" to the Respondent - see paragraph 9 (d) of the Case Stated set out above (and paragraph 12 of the Written Decision which was appended to the Case Stated). This 'personal evidence' included -

a) The contention that the Respondent took the job at the Council "out of necessity";
b) That the Respondent had a genuine interest in and exceptional commitment to the farm;
c) His commitment to the farm was not matched by a corresponding commitment to a career with the Council.

[8] Mr Shaw argued that the Member appears to have undertaken a balancing exercise where the factors relating to the Respondent's occupation as a farmer were weighed against the factors linked to his occupation at the City Council. Having weighed these factors in the balance the Member "concluded that in terms of which was of primary concern or importance to him, but viewed objectively, his occupation as a farmer far outweighed his occupation at the Council" and that was sufficient to tip the balance in favour of treating farming as his primary occupation. It was submitted that this approach, which introduced subjective elements into what was accepted to be an objective assessment, was incorrect. Referring to paragraphs 5 and 12 of the Written Decision Mr Shaw submitted that it was apparent that the Member introduced a subjective element into the test to be applied. At paragraph 5 he stated –

> "5. Where, as in this case, a person has more than one occupation the issue for the Tribunal to determine is which was his primary occupation at the relevant time. It is a question therefore of balance that requires a consideration and weighting of the individual occupations. It is a test that requires an objective inference to be drawn from the facts. It is a personal test and the matters to be taken into account and their relevance will depend on the particular circumstances of each individual. In some cases the answer will be readily apparent. In others it will not. The term occupation has not got a technical meaning; and therefore it must be given its ordinary meaning, which is that which engages the daily time and the attention of a person (see McCoy v Commissioner of Valuation [1989] VR13511988). Correctly, in the view of the Tribunal, a broad approach has been taken to the issue of primacy. It goes beyond an analysis of the

> day-to-day carrying on or directing of operations to include a question of which occupation is of primary concern or importance (see e.g. Gammans v Parsons (1953) 46 R&IT 527; Scott v Billett (1956) 1 RRC 29; and Passam and Passam v Richardson (1957) 1 RRC 271). So, it requires a qualitative as well as a quantitative assessment and the relative time devoted to each or the financial returns or relative contribution to the livelihood may not be the only measure (see Scott v Billett)."

And at paragraph 12 he continued –

> "However, the Tribunal accepts Mr Wilson's evidence that he took the job at the Council out of necessity arising from family circumstances. It was not his preferred option to farming. Clearly he had no capital invested in the Council and a substantial investment in the farming venture, which he continued to improve. Taking that together with the overall impression given by what Mr Wilson said the Tribunal believes that he had a genuine interest in farming and an exceptional commitment to operating and developing this family farm. His commitment to that was not matched by any with the Council. Viewed objectively but in terms of primary concern or importance to him, occupation as a farmer of this land far outweighed his occupation at the Council. In this case that is sufficient to tip the balance the other way and the Tribunal therefore concludes that the house was occupied in connection with agricultural land and used as the dwelling of a person whose primary occupation was the carrying on or directing of agricultural operations on that land."

[9] Mr Shaw highlighted the use of the word 'qualitative' in paragraph 5 (repeated at paragraph 9(d) of the Case Stated) and the phrases 'his preferred option', 'the overall impression given by what Mr Wilson said' and 'of primary concern or importance to him' in paragraph 12. It was submitted that this approach, that is viewing the issue through the prism of what was of importance to the respondent, was not supported by authority and in particular not borne out by the authorities quoted at paragraph 5 of the Written Decision. I will consider each of these in chronological order.

[10] In Gammon v Parsons (Valuation Officer) a solicitor who practised in Portsmouth usually resided in Southsea. He owned a farm of 900 acres near

Liphook in Hampshire, and visited it two or three times per week. He directed agricultural operations there which were carried out by five employees residing in tied houses on the farm. During school holidays he and his family resided on the farm. He claimed that the farmhouse was the dwelling-house of a person (himself) who was at all times primarily engaged in carrying out agricultural operations on the farm, under section 72 of the Local Government Act 1929, (which is in similar terms to Article 39 and Schedule 12 of the 1977 Order). In giving the judgment of the Lands Tribunal the President (Sir William FitzGerald) said that the object of section 72 was to extend relief to those whose livelihood was in the main derived from farming, then a precarious occupation. In rejecting the claim for relief the President observed that the solicitor was actively engaged in practice and that the farming operations were of secondary importance to him so far as his livelihood was concerned. In the course of the short judgment the President stated –

> "In our view, the necessary qualification for the relief provided by the section is a personal one, and we must decide whether the ratepayer is in fact carrying on or directing agricultural operations on the land occupied with the dwelling-house and, if so, whether he is primarily so engaged. There is no doubt that he is engaged in directing agricultural operations, but, as we have indicated, the question as to whether he is primarily so engaged rests on facts which are peculiar to him personally."

[11] In Scott v Billet (Valuation Officer) the appellant was a practising barrister on the Western Circuit who lived on a farm of about 78 acres near Newton Abbott. He actively managed the farm and employed two employees, one part time. He devoted more time and capital to the farm than to his practice at the Bar, but his losses on the farm heavily outweighed the net income from his barrister's practice and it was clear that the farm was subsidised out of other resources. The Member of the Lands Tribunal (JPC Done, who sat with the President in Gammon v Parsons) in allowing the appeal looked objectively at four circumstances from which he concluded –

> "The general combination of circumstances in this case seem (sic) to me to be in favour of the appellant's contention. I am satisfied that he devotes more time to his farming than to his practice, and he certainly devotes more capital resources to it. He lives in a village so remote that no barrister intent on developing a practice to its full capacity would so handicap himself; and lastly and most significantly he

clings to his farming in spite of losses which are quite unjustified in relation to the profits of the practice."

[12] In Passam and Passam v Richardson (Valuation Officer) the appellants were in almost continual occupation as supply teachers and lived in a dwelling-house on 7.37 acres of agricultural land. Planning permission to build the house had been granted subject to a condition that the land should be attributed to the house and worked as a small-holding. The appellants relied on their teaching salaries for income, while the land showed no profit and needed much capital expenditure. The Member (JPC Done) said that the inference to be drawn from the condition attached to the planning permission was that the house was to be regarded as a dwelling-house required in connection with agricultural operations. Nonetheless the Rating Authority contended that the house did not qualify as an agricultural dwelling-house within the term of section 72 of the Local Government Act 1972. The Member viewed the site and commented that it showed no sign of being the primary concern of anyone who relied upon it for a livelihood. He concluded that neither of the appellants was primarily engaged in agricultural operations on the associated land.

[13] Mr Shaw contended that none of these cases provided support for the proposition that whichever occupation was of primary importance or concern to the ratepayer was a relevant factor or that the test involved a qualitative as well as a quantitative assessment. The proper approach it was submitted was that identified by the President of the Lands Tribunal of Northern Ireland in the appeal of McCoy v Commissioner of Valuation VR/35/1988. In that appeal the Commissioner of Valuation entered in the Rating List a dwelling at Meegowan, Dromore, Co Tyrone as a private dwelling (HOG) and not as an agricultural dwelling, it previously having been entered in the list as a farmhouse under the description H(AG). The Commissioner took this decision having regard to the owner's occupation as a Civil Servant. The owner appealed to the Lands Tribunal. The facts bear some similarity to the present appeal. The appellant was 42 years of age and employed as an Executive Officer in the Department of Health and Social Services in Omagh. This employment was full time and pensionable and involved attendance each week-day for a total of 42 hours. His normal hours were 9am to 5pm but were subject to flexibility arrangements with colleagues. After a four year course at University in Chemical Engineering, he returned to help his father on the family farm for about 18 months. He then took up employment with the DHSS. When his father died he inherited some 80 acres which he later increased to 120 acres. He constructed a bungalow on the land four years after leaving University and had lived there ever since. He had a herd of cattle for beef production and grew grass for silage for winter feeding. Much of the work was carried out by contractors, but the appellant spent as much time as required working on the farm and his wife helped out from time to time. This farming activity was profitable.

[14] The sole issue in the appeal to the Lands Tribunal was whether the carrying on of farming operations on the land was the primary occupation of the appellant. In the course of his decision the then President of the Lands Tribunal, His Honour Judge Rowland QC, after referring to the two English cases – Scott v Billett and Gammon v Parsons – accurately set out the law on the proper approach to the issue raised. At page 6 of his decision, in his usual style and economy of language, he stated –

> "The Tribunal accepts that the term 'occupation' has not got a technical meaning; therefore it must be given its ordinary meaning which is that which engages the time and attention of a person. Faced with the task of applying the ordinary meaning of the phrase 'primary occupation ' to the facts as found the Tribunal must stand back and ask in an objective way, as a reasonable onlooker might ask the Appellant "What is your job? What engages your daily time and attention? Upon what business are you normally engaged every day?" If the answer to those questions is "I have two occupations, farming and the Civil Service" then the further question must be asked – which is paramount or more important or in short, which of them is primary? Once again an objective inference must be drawn from the facts which are peculiar to the Appellant personally so far as his livelihood is concerned. When that is done it seems to the Tribunal the true and reasonable conclusion is that his job in the Civil Service is his "primary occupation". It is a full time job; it occupies by far the greater proportion of his time, attention and availability; it is pensionable in the same way as other jobs in the Civil Service; it is a career in which promotion is attainable and has been attained; it is a major source of livelihood to him; he must make himself available to do his job at regular specified hours every day and therefore it takes precedence over his farming activities. The purpose of this legislation is to extend relief to those whose livelihood is in the main derived from farming; but those not dependent upon farming, even though engaged therein, would be denied relief by inserting the word "primarily". In the present appeal the Tribunal finds that the Appellant is not primarily dependent on farming for his livelihood and farming

is not his primary occupation. Therefore his appeal must be dismissed.

[15] It was submitted by Mr Shaw that in relation to the crucial issue the Tribunal should ascertain the facts and then ask what objective inference can be drawn from those facts, which are peculiar to the ratepayer, to answer the question - which of the two occupations is the primary occupations. The view of the ratepayer as to which occupation he regards as primary or of importance to him is of no relevance. No qualitative assessment arises and the Member in stating in his written decision that the importance of farming to the respondent tipped the balance adopted the wrong approach.

[16] Mr Wilson, who was not legally represented, made a short submission to the court. He found it stressful that this issue should be before the Court of Appeal three years after the original valuation was challenged. He said that 37% of farmers (about 45,000 in number) are ratepayers in exactly the same position as he is in and as such they provide much needed support for the farming industry. The farm has been in his family for three generations. It is self sufficient and he and his wife do everything on the farm. The adjoining house is their only home and if it was determined that his primary occupation was carrying on agricultural operations on the land, he did not disagree with the Net Annual Valuation which was proposed. Such profits as have been made have been reinvested in the farm and he has increased the cattle stock by 50%. He stressed his individual circumstances and that the test should be applied to them.

[17] Undoubtedly the objective of Article 39 and Schedule 12 of the 1977 Order remains as it was under Section 72 of the Local Government Act 1929, to provide relief to those engage in agricultural operations. The inclusion of the word 'primarily' anticipated that some home owners with agricultural land may make their livelihood in other ways and was intended to limit the class of owners entitled to relief. It could never be the case that the ratepayer could by his own preference determine whether he was entitled to relief or not. Clearly an objective test, as envisaged by His Honour Judge Rowland QC, is the appropriate test to apply and subjective matters are not relevant. The Member has correctly stated the test to be applied as objective – see paragraph 9(b) of the Case Stated and paragraph 5 of the Written Decision. It is an objective test of the individual circumstances of the ratepayer, as Mr Wilson, the respondent asserted. The function of the decision-maker (whether Commissioner or Tribunal) is to ascertain the facts, drawing any appropriate inferences at that stage and to state them clearly. Having done he should stand back and consider those facts and ask whether, objectively, the ratepayer's livelihood is in the main derived from farming. In the instant case the facts included – the respondent holds (and has held for a number of years) a responsible and identifiable post of authority with a public utility; that position requires him to fulfil that position a minimum number of hours per

week at least, though starting and ending times were flexible; he requires to travel to and from that employment on a regular daily basis; he receives a fixed remuneration which is pensionable after a certain age and for life. By contrast he works on the farm when not committed to his public post; he receives no regular income from farming (though any profit or surplus is reinvested). Undoubtedly he derives much satisfaction from farming and places it above his public position in terms of importance to him. However that is a subjective matter. The ratepayer himself cannot determine the category into which he should be placed for the purposes of fixing the rateable value. The Member has correctly identified the test as objective but misapplied it. In taking into account the respondent's respective commitment to farming and his public appointment and which of the two was of more concern or importance to him, the Member took into account subjective matters and fell into error. The Member stated that he viewed those matters objectively; however they are the views of the respondent and are subjective. The Member balanced one against the other and found that the one that was of primary concern or importance to the respondent, tipped the balance in favour of treating farming as his primary occupation. He considered the test required a quantitative as well as a qualitative assessment. It is not clear on what basis the Member found quantity and quality to be relevant. There may be a certain quantification element involved in considering the hourly commitment per week and the income/profit and loss factors in each occupation. There may be a qualitative element to the question which of the two occupations is of greater importance to the respondent or which provides the greater satisfaction, but as I have said all of those matters are subjective and are thereby irrelevant.

[18] I do not see the application of the test as a balancing exercise involving a quantitative and qualitative assessment. It is simply a matter of looking at the individual circumstances and asking objectively "Upon what business is the ratepayer normally engaged every day?" If the answer to that question is "I have two occupations" then the further question must be asked – "Which is paramount or more important, in other words which is primary?". An objective inference must be drawn from the established facts which are personal to the respondent so far as his livelihood is concerned. When that is done it is clear that his public position with Lisburn City Council is his primary occupation. Much of what His Honour Judge Rowland QC found objectively determinative in McCoy is applicable in this case. The respondent's position with Lisburn City Council is a full time job; it occupies much of his time, attention and availability on a regular basis; it is pensionable; it is the major source of his livelihood and it takes precedence over his farming on a regular daily basis. In balancing the two occupations and taking into account as the tipping point the importance of farming to the respondent, the Member fell into error in the application of the test to be applied.

[19] Therefore I would answer the questions asked in the following way –

(a) No;
(b) No;
(c)No;
(d) No;
(e) No.

and allow the appeal.

GIRVAN LJ

Introduction

[20] This matter comes before the court by way of a case stated from the Lands Tribunal. Although the Tribunal poses five questions one central question arises for determination on the appeal namely whether the Tribunal was correct in law in concluding that the respondent to the appeal, Mr Wilson, was entitled to have his dwelling at 217 Ballynahinch Road, Dromore ("the premises") distinguished in the Valuation List as a farmhouse under the provisions of Article 39 and Schedule 12 Part II of the Rates (Northern Ireland) Order 1977. On the hearing of the appeal Mr Shaw QC appeared with Mr McAlister on behalf of the Commissioner. The respondent was not represented but attended the hearing, inviting the court to uphold the decision of the Tribunal.

The relevant statutory provisions

[21] The material provisions of the 1977 Order are Article 39 and Schedule 12 Part II. Article 39 provides:

> "(1) For the purposes of this Order every hereditament shall be valued upon an estimate of its net annual value.
>
> (2) Without prejudice to any other statutory provision … Schedule 12 shall have effect for the purpose of providing for the manner in which the net annual value of the hereditament is to be, or may be, estimated, and the other provisions of that schedule shall have effect.
>
> (3) Where any provision of Schedule 12 empowers the Department to make an order modifying any other provision of the schedule or providing for the method by which the net annual value of any hereditament is to be determined, the order –
>
> (a) may contain such incidental, supplemental and transitional provisions as the Department considers necessary or expedient, including provisions modifying this order;
>
> (b) shall be made only after consultation with any association which appears to the department to be representative of district council or, where

the order affects only the district of a particular council, after consultation with the district council which appears to the department to be concerned; and

(c) shall be subject to an affirmative resolution;

(d) and an order providing for the method by which the net annual value of any hereditament is to be determined may provide for determining that value by the application of different methods of valuation to different parts of the hereditament."

Schedule 12 Part II provides:

"Part II Farmhouses

The net annual value of a house occupied in connection with agricultural land … and used as the dwelling of a person –

(a) whose primary occupation is the carrying on or directing of agricultural … operations on that land; or

(b) who is employed in agricultural … operations on that land and the serve of the occupier thereof and is entitled, whether his tenant or otherwise, so to use the house only whilst so employed,

Shall so long as the house is so occupied and used be estimated by a reference to the rent of which the house might reasonably be expected to let from year to year if it could not be occupied and used otherwise than as aforesaid."

The evidential background

[22] The premises are occupied by the respondent Mr Wilson as his dwelling. They were so occupied in 2005 being the relevant year for the purposes of the rating appeal. It is a detached bungalow with a defined garden which in turn is surrounded by farmland comprising 37 hectres occupied and owned by Mr Wilson. It is accepted by the Commissioner that the dwelling is occupied in connection with agricultural land.

[23] The respondent has two occupations. He is a farmer and he works full-time for Lisburn City Council ("the Council").

[24] The respondent is qualified as a surveyor. In or about 1992 he set up his own planning consultancy business working from home. His parents owned a farm and when the respondent's brother left school he worked full-time on the farm with his father. The respondent help on the family farm. With financial help from his father he purchased an adjacent farm of six acres. Prior to 1995 the respondent worked for 37 hours on his consultancy business but his brother then unexpectedly died. The respondent's father being then aged 85 and in ill health the respondent took over the working of the farm and while he continued the consultancy business he devoted more time to working on the farm. His father died in 1996 and his mother in 2002. As a result he borrowed in order to make financial provision for his late brother's family and in accordance with his mother's will, for his sister. In 1999 for financial reasons he took up employment with the local Council.

[25] The respondent is an assistant director with the Council's Environmental Services Department. Twenty-one other employees report to him. By contract he is required to work 37 hours with the Council. He can work from home from where he has secure access to the Council's information technology system. The Council's operation involves flexible working hours. There is no fixed core time during which he is required to be present in the office although he must maintain appropriate service standards and lead his staff. He is not entitled to overtime but does receive time off in lieu. His job is pensionable with promotion prospects.

[26] On weekdays the respondent works on the farm before and after work at the Council. He spends all his weekends at the farm. He has no set pattern of work within the Council. He is able to manage his time so as to facilitate visits to the farm. He has increased his livestock from 40 head to 70 head a year. The farm consists of 30 acres of silage, 10 acres of barley and the remainder in grazing. The respondent with family help does all the work on the farm.

[27] Trading accounts at the farm for the year ending 5 April 2004 showed an income of £27,004 with expenses of £35,820 leading to a net loss of £8,816 for the year.

[28] The Tribunal concluded that the house was occupied in connection with agricultural land and used as the dwelling of a person whose primary occupation was the carrying on or directing of agricultural operations on the land. Its reasoning leading to that conclusion set out in paragraphs 11 and 12 of the Tribunal's decision:

> "11. The farm may be said to be a larger small farm, its size is about the average for Northern Ireland. Both Mr Wilson's occupations would be full-time occupations for some and the Tribunal does not find any significant difference in the time he devoted to each. He had chosen a very flexible employer but the Council generally had priority in the allocation of his availability. His gross salary from off the farm was something more than his gross income from the farm. On these factors alone the balance would lean towards not treating farming as his primary occupation.
>
> 12. However, the Tribunal accepts Mr Wilson's evidence that he took the job at the Council out of necessity arising from family circumstances. It was not his preferred option to farming. Clearly he had no capital invested in the Council and a substantial investment in the farming venture, which he continued to improve. Taking that together with the overall impression given by what Mr Wilson said the Tribunal believes that he had a genuine interest in farming and an exceptional commitment to operating and developing his family farm. His commitment to that was not matched by any corresponding commitment to a career with the Council. Viewed objectively but in terms of primary concern or importance to him, occupation as a farmer of this land and farmer's wages occupation of the Council. In this case that is sufficient to tip the balance the other way and the Tribunal therefore concludes that the house was occupied in connection with agriculture land and used as the dwelling of a person whose primary occupation was the carrying on or directing of agricultural operations on that land."

[29] If the dwelling is to be entered on the list as a farmhouse / agricultural dwelling as defined by the 1977 Order the Commissioner would propose to reduce the NAV from £460 to £420. The Tribunal did not hear any argument on that and did not make any determination on the issue and the Member in the case stated makes clear that he reserved his position as to the correctness of the proposed amendment to the NAV. This would become a live issue for determination in the event of the Member's conclusion being upheld in this appeal.

The Commissioner's Contentions

[30] Mr Shaw QC appearing with McAlister on behalf of the Commissioner submitted that the correct approach to the question as to the ratepayer's primary occupation was that adopted by the Tribunal in McCoy v Commissioner of Valuation for Northern Ireland VR/35/1988. The task for the Tribunal is to ascertain the facts and then stand back and ask in an objective way: What is the ratepayer's job? What engages his daily time and attention? And what business is he normally engaged on everyday? Where, as here and in McCoy, the ratepayer had two jobs a further question must be posed: What is the paramount or more important occupation? In short, which is the primary occupation? An objective inference must be drawn from the facts which are peculiar to the rateable occupier so far as his livelihood is concerned. It was argued that the member had fallen into error by admitting or using subjective elements in his assessment. The Member appeared to have recognised that on an objective assessment farming was not the primary occupation of the respondent having regard to an objective assessment of three factors, namely the time he devoted to his job at the Council compared to farming, its primacy in the allocation of his availability to the Council rather than the farm, and his income from the Council as compared to his loss from the farm activities. The personal evidence relied on by the Member appeared to have tipped the balance in the Member's assessment in favour of farming being the primary occupation. The Member's reasoning in this regard was flawed and his approach was not supported by any of the earlier Lands Tribunal's authorities. The Member's approach failed to respect the policy and wording of the Order which is geared to giving relief to the limited class of people who are primarily engaged in their occupation of farming rather than those for whom it may be there first love but their secondary occupation.

The authorities

[31] In McCoy v Commissioner for Valuation VR/35/1988, a decision of Judge Rowland QC given on 23 June 1989 the ratepayer was a civil servant who worked 42 hours a week as a an executive officer in a full-time pensionable position. He was precluded from undertaking remunerative private work which would occupy his time and attention and render him unavailable for duty during normal official hours. He occupied agricultural land in which he had 120 head of cattle and the land was used for livestock and grass production. Most of the work was done by contractors. The appellant and his wife did crop and animal husbandry work. The business was profitable with receipts of £25,000 and a net profit of £15,000 which slightly exceeded his income from the Civil Service job. Judge Rowland outlined the approach in determining primary occupation in a case in which the applicant had two occupations thus.

> "1. 'Occupation' means that which engages the time and attention of a person.
>
> 2. The Tribunal must ask in an objective way as a reasonable onlooker might ask of the appellant what is your job? What engages your daily time and attention? Upon what business are you normally engaged everyday?
>
> 3. If there are two occupations a further question must be asked: Which is paramount or more important or, in short, which of them is primary?
>
> 4. An objective inference must be drawn from the facts which are peculiar to the appellant personally as far as his livelihood is concerned."

The Tribunal in that case decided that the appellant's job in the Civil Service was his primary occupation:

> "It is his full-time job. It occupies by far the greater proposition of his time, attention and availability; it is pensionable … it is career in which promotion is attainable and has been attained; it is a major source of livelihood; he must make himself available to do his job at regular specified hours everyday and therefore it takes precedence over his farming activities. The purpose of this legislation is to extend relief to those whose livelihood is in the main derived from farming; but those not dependent upon farming, even though engaged therein, would be denied relief by inserting the word 'primarily'."

[32] In Scott v Billett (Valuation Officer) (1956) 1 RRC 29 a practising barrister occupied a farm of 78 acres with a farmhouse. He devoted more time and capital to the farm than to his practice at the Bar. Losses from the farm heavily outweighed the net income from the practice. The Tribunal considered that primary engagement was not determined solely by financial terms though it may carry much weight. Nor would it be permissible to view practice at the Bar as more prestigious than the occupation of farmer. In that case what weighed with the Tribunal was that the ratepayer devoted more time to farming, devoted more capital to it, was not developing his career as a barrister to its full capacity and clung to his farming in spite of losses. On the other hand in Gammons v Parsons (1953) 46 RNIT 345 relief was refused to a solicitor who was engaged in practice who owned a farm of 9,000 acres and directed agricultural operations thereon the work being carried by a foreman

and four employees. The ratepayer visited the farm 2 or 3 times a week except for two months of the year and his residence at the farmhouse was confined to periods when his children were on holiday. The Tribunal concluded that the object of the section was to extend relief to persons whose livelihood was in the main derived from what in 1929 was a somewhat precarious occupation. The Tribunal stated:

> "Clearly the ratepayer is a solicitor actively engaged in a considerable practice and in present circumstances the farming operations are, in our view, of secondary importance to him so far as his livelihood is concerned. For that reason, we found that he is not primarily engaged in farming operations in the land occupied with a dwelling house …"

In Passam and Passam v Richardson (1957) 1 RRC 271 the appellant ratepayer occupied a dwelling house on some seven acres of agricultural land used as a small holding. The appellants were in almost continuous occupation as supply teachers and relied for income almost entirely on their teaching salaries. Small holdings showed no profits and it needed much capital expenditure which the appellant's could not afford. Having viewed the hereditament the Tribunal concluded that it showed no signs of being the primary concern of anyone relying on it for a livelihood.

Conclusions

[33] The approach adopted by Judge Rowland QC in McCoy v Commissioner of Valuation most clearly and succinctly sets out the proper approach to the question of determining which of two occupations falls to be considered as the primary occupation. Whilst the Tribunal did not find a significant difference in time devoted to each of the two occupations the member did accept that the Council had priority in the allocation of his availability. In paragraph 11 of the decision the Tribunal concluded that his gross salary from the Council job was "something more" than his gross income from the farm. In fact the evidence clearly established that the farm was making a loss. While the gross income from the farm may have been somewhat less than the gross income from his employment as a Council official the true comparison must be between the effective net income from the two occupations. Even in light of the approach adopted by the Member in relation to income (which was unduly favourable to the ratepayer when considering the objective factors) the Member concluded that those factors alone would lean towards not treating the farming activity as his primary occupation. When one properly takes account of the net loss from the farm this a fortiori the position.

[34] The subjective personal factors listed in paragraph 12 of the decision led the Member to conclude that notwithstanding that the objective evidence pointed to the Council job being his primary occupation the primary concern or importance of farming to the respondent tipped the scales in favour of his occupation as a farmer outweighing his Council occupation. The question of what constitutes the primary occupation of a person with two occupations must, however, be determined on an objective assessment of the material factors. If the scales are fairly evenly balanced on the question of which of two occupations is the primary occupation there may be room for taking into consideration the degree of the ratepayer's subjective sense of commitment to each of the two occupations. However, in this case the objective evidence pointed clearly to the Council occupation being the primary occupation. The finding that the Council generally had priority in the allocation of his availability was an important one pointing to the clear conclusion that the respondent had to fit his farming activities around and subject to his Council job commitments. This factor and the clear disparity between the income from the Council occupation compared to the loss from the farming activity leads to the clear conclusion that the farming activity was not his primary occupation. Applying the approach of the House of Lords in Edwards v Bairstow [1956] AC 14 and the test to be applied by the Court of Appeal as stated at 36 this court must reach a different conclusion from that reached by the Member.

[35] I agree with Higgins LJ that each of the questions posed in the case stated should be answered "No" and I too would allow the appeal.

McCLOSKEY J

[36] I agree with Higgins LJ and Girvan LJ that this appeal should be allowed, essentially for the reasons provided by them. Given that we are quashing the carefully constructed decision of a fact-finding and specialised tribunal and taking into account the comparative rarity of appeals of this *genre*, I would add the following.

[37] The original decision was made by the Commissioner of Valuation. It was successfully challenged by the present Respondent before the tribunal. It seems to me that, in this type of case, the tribunal's task is essentially twofold. Firstly, it must find the material facts. This exercise entails finding those facts which have a bearing on the proper categorisation of the land and premises in question. In the present case, this involved the tribunal in investigating the factual issues relating to the question of whether the Respondent's property was, in the language of the legislation, "*… a house occupied in connection with agricultural land … and used as the dwelling of a person … whose primary occupation is the carrying on or directing of agricultural … operations on that land …*"..: See Part II of Schedule 12 to the Rates (Northern Ireland) Order 1977.

[38] In this primary, fact-finding exercise which must be conducted by the tribunal, one can readily envisage scope for subjective claims and assertions by the ratepayer. Thus, in the present case, it is evident that the Respondent gave evidence about the apportionment of his time, attention and priorities between his salaried employment with the Council (on the one hand) and his work on the farm (on the other). By its very nature, much of this evidence would not have been susceptible to objective proof or verification. Rather, it would have contained a substantial subjective element. Where matters of this kind are concerned, the assessments, findings and conclusions to be made are primarily a matter for the tribunal and will rarely be successfully challenged on appeal: see ***Edwards –v- Bairstow*** [1956] AC 14, where Lord Radcliffe stated (at p. 36):

> "*When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything* ***ex facie*** *which is bad law and which bears upon the determination, it is obviously erroneous in point of law. But, without any such misconception appearing ex facie,* ***it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.*** *It has no option but to assume that there has been*

> *some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law*".

[Emphasis added].

In short, the tribunal enjoys the conspicuous advantage of hearing and viewing the evidence at first hand and forming its impressions and views accordingly. As a result, the threshold for interference by an appellate court in matters of fact finding and drawing inferences is an elevated one, in both this context and others.

[39] The second part of the exercise to be performed by the tribunal in this type of case is, however, of a character significantly different from its initial, fact-finding task. Having found the facts, it is incumbent on the tribunal to form an evaluative judgment, based on the material facts which it has found. At this – the second – stage, the subjective claims and assertions of the ratepayer are no longer relevant. The crucial question for the tribunal is whether the facts found by it would support a conclusion that the ratepayer's primary occupation is farming. This behoved the present tribunal to stand back and to consider, in a balanced and evaluative fashion, whether, having regard to the facts found, the ratepayer's livelihood "*… is in the main derived from farming*" (per Judge Rowland QC in ***McCoy –v- Commissioner of Valuation*** [VR/35/1988], p. 6). Objectivity is the very essence of this exercise.

[40] In the present case, the error of law into which the tribunal fell comprised not its formulation of the test to be applied, rather its application thereof. Stated succinctly, the tribunal misapplied the test. This misapplication consisted of conflating the two separate exercises identified above. In particular, matters of subjective and personal importance and priority to the Respondent ratepayer had no role to play at this stage. Rather, these belonged to the first stage, that is to say the process of finding the material facts. Furthermore, in its decision, the tribunal employed the language "*qualitative and quantitative assessment*". While the true intended import of this phrase is not entirely clear, it is the kind of language which risks a misunderstanding and/or misapplication of the correct test to be applied. The second stage required the tribunal to form an objective, evaluative assessment of the facts found by it.

[41] It may be of importance to emphasize that the determination of this appeal does not involve any significant point of legal principle. I mention this because, at the conclusion of the hearing, the Respondent (who was unrepresented) appeared to suggest that this was a test case of sorts. While the court is, of course, unaware of other cases which might be considered by the Respondent, other ratepayers or, indeed, the Commissioner to be related

to the present one, it may be stated clearly that the unanimous decision of this court is confined to the peculiar facts of this case.

[42] Misunderstandings about the doctrine of precedent can and do occur amongst practitioners. In ***White –v- Department of the Environment*** [1988] 5 NIJB 1, in a quite different context, Nicholson J resisted the invitation to distil a legal principle from the many reported cases cited to him. Lowry LCJ, delivering the judgment of the Court of Appeal, having highlighted the number of such cases, observed pointedly (at p. 3):

> "*… We refrain from styling them authorities …*
>
> [P. 9] *We completely agree with the approach to the case and we also endorse the learned trial judge's refusal to distil a legal principle from the many and various cases which were cited to him*."

More recently, Lord Neuberger of Abbotsbury, writing extra-judicially, stated:

> "*The essential feature of common law is that it is judge made. The common law is established and developed through the medium of judicial decisions, which apply or adapt principles laid down in earlier cases to contemporary problems.*
>
> ***Precedent involves rules or principles of law being made by decisions of courts. In general, a court is bound by the essential legal reasoning, or ratio decidendi, of decisions made by courts superior to it and it is either bound by or will normally follow the ratio of decisions of courts of co-ordinate jurisdiction***".

[***Halsbury's Laws of England, Centenary Essays 2007,*** p. 70 – emphasis added].

[43] In the present context, there is a *corpus* of earlier decisions, albeit of tribunals of inferior standing, setting out the correct approach in cases of this kind. These are summarised by Higgins LJ, in paragraphs [10] – [14] of his judgment. By its present decision, this court endorses, and applies, a well established approach. Insofar as no appellate court has done so previously,

the present decision may properly be regarded as having precedent value. However, this characteristic is limited to the question of the correct legal test and governing principles. In contrast, in its factual dimension, this decision determines the instant case only. In this sphere, every case will be unavoidably fact-sensitive.