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Judgment: approved by the Court for handing down | *Delivered:* **30/06/2014**
*(subject to editorial corrections)**

2013 No: 103699

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

THE COMMISSIONER OF VALUATION FOR NORTHERN IRELAND

Appellant;

-and-

DEBENHAMS PLC

Respondent.

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Before: Higgins LJ, Girvan LJ and Coghlin LJ

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GIRVAN LJ

Introduction

[1] This matter comes before the court by way of a case stated from the Lands Tribunal ("the Tribunal") dated 30 September 2013. It raises a question as to the admissibility of evidence in a rating appeal brought by Debenhams plc ("Debenhams") against the decision dated 31 August 2011 of the Commissioner of Valuation for Northern Ireland ("the Commissioner") who refused an appeal brought by Debenhams against a refusal by the District Valuer to make an alteration in the valuation list in respect of Debenhams' hereditament at Unit 13, Fairhill Shopping Centre, Ballymena, Co Antrim ("the relevant hereditament"). The District Valuer assessed at £225,000 the net annual value ("the NAV") of the relevant hereditament. Debenhams challenges the correctness of that valuation.

[2] Mr Shaw QC appeared with Mr Lunny on behalf of the Commissioner, the respondent before the Tribunal, who is the appellant in the appeal before this court. Mr Beattie QC appeared on behalf of Debenhams, the appellant before the Tribunal and respondent in the present appeal. The court is indebted to counsel for their helpful and well-structured submissions, both written and oral.

The Factual Context

[3] Fairhill Shopping Centre opened about 1991. It was within the town centre. About 2000 the mall within the centre was extended by the addition of eight smaller units. The mall was then described as a hockey stick in layout. At one end there was a pedestrian access to a secondary shopping street. At the other there was access to a surface car park. Short side malls led to larger units, one occupied by the Co-Op and one by Marks and Spencer.

[4] Hereditaments in existence in 2003 in the shopping centre were valued in the course of the Fifth General Revaluation which was published in April 2003 and which gives rise to the current valuation list. In 2004 Marks and Spencer was extended with a total area of 6,238 square metres and was valued on an *overall* basis at £485,000 NAV. The Co-Op was replaced by a large unit, BHS, with a total area of 3,455 square metres valued on *overall* basis at £280,000 NAV, and 13 smaller units. In addition a multi-storey car park was provided beside Marks and Spencer.

[5] In 2007 a smaller unit at the end of the mall beside the surface car park was extended to form a large unit. This was the hereditament occupied by Debenhams. The ground floor retail area was 752 square metres, the first floor retail 754 square metres, totalling 1,507 square metres. In September 2008 Debenhams was first entered in the list by the District Valuer at £225,000 NAV. He used a *zoning* approach. Debenhams lodged an appeal to the Commissioner in October 2008 pursuant to Article 51(1) of the Rates (Northern Ireland) Order 1977 ("the 1977 Order").

[6] In 2009 BHS was sub-divided into two large units. One was occupied by Next ground floor retail 1,168 square metres, first floor retail 908 square metres totalling 2,076 square metres. The other was occupied by New Look ground floor retail 915 square metres, first floor retail 707 square metres totalling 1,622 square metres. In October 2009, while the appeal in relation to Debenhams was pending, Next and New Look were entered in the list by the District Valuer who in relation to Next fixed the NAV in the sum of £243,000 and in relation to New Look in the sum of £190,000 NAV. He valued both on an *overall* basis. Next and New Look both appealed to the Commissioner in November 2008 pursuant to Article 51(1). These appeals remain undecided notwithstanding the very considerable lapse of time.

[7] After a very protracted period eventually in August 2011 the Commissioner gave his decision in relation to Debenhams. He decided to make no change. Nor did he make any alteration to the other larger units Next or New Look. Debenhams lodged an appeal to the Tribunal. Mr Shaw was unable to provide any explanation or justification for the very considerable period of delay involved in the Commissioner's decision in respect of Debenhams or in relation to Next and New Look whose appeals to the Commissioner remain unresolved. As Mr Beattie pointed out, such delays on the part of the Commissioner result in potential injustice to the

ratepayers who must pay rates on the existing NAV as established by the District Valuer until the ratepayers' appeals are ultimately decided. If the ratepayers prove subsequently that they are entitled to a reduction in the NAV of the relevant hereditaments they will be shown to have been considerably out of pocket for a considerable period of time as a result of the Commissioner's delay.

The Proceedings before the Tribunal

[8] The Tribunal heard evidence in respect of the appeal from 6 June 2012 to 8 June 2012. Between 18 June 2012 and 20 April 2013 the Tribunal received submissions from the parties on the issue whether it should exclude evidence relating to the hereditaments occupied by Next and New Look when reaching its decision regarding the hereditament occupied by Debenhams. It was accepted that the relevant valuation date in respect of Debenhams' hereditament was 19 September 2008, the date of the District Valuer's Certificate. Debenhams contend that the Tribunal should consider in particular the NAV of the hereditaments of Next and New Look which were entered into the valuation list on 19 October 2008 some 13 months after 19 September 2009. In particular Debenhams relies on the fact that in relation to the Debenhams' hereditament the District Valuer adopted a *zoning* method of valuation whereas in the case of Next and New Look he adopted an *overall* basis of valuation. The ratepayer contends that there was no justification for a difference of approach having regard to the comparability of the premises. The Commissioner maintained that these other two hereditaments should be left out of consideration because, although they were in the list at the time of the Commissioner's decision on 31 August 2011, they were not in the list at the relevant valuation date 19 September 2008.

[9] According to paragraph 6 of the case stated:

> " … the Commissioner suggested that the Tribunal was entitled (if not obliged) to exclude the entries related to Next and New Look in arriving at its determination on the ultimate issue and, indeed, should do so."

The Commissioner's contention so formulated suggests that he was arguing that the Tribunal had a discretionary power to exclude evidence relating to the Next and New Look entries and that it should in the exercise of a discretion exclude the evidence which Debenhams seeks to adduce in support of its case. A court or tribunal in deciding any case must take account of relevant and admissible evidence. While in certain circumstances a court may exclude evidence by exercising a judicial discretion (where, for example, in a criminal case the evidence in question is more prejudicial than probative or where the interests of fairness call for its exclusion) common law courts and tribunals applying civil rather than criminal law have disclaimed any general discretion to exclude evidence. There is no authority for the exclusion of evidence on the grounds that its prejudicial effect outweighs its

probative value (see, for example, Phipson on Evidence 18th Edition paragraph 39.34 and the discussion in Breslin and others v McKevitt and others [No.1] [2001] NICA 33). The underlying premise in the Commissioner's argument that evidence could be excluded on a discretionary basis was thus erroneous.

[10] At paragraph 8 of the case stated the Tribunal went on to state:

> "In the interest of justice and fairness, the parties agreed that the Tribunal should deal with this exclusion point as a preliminary point and pose the issue in an agreed formulation as follows:
>
> > 'In reaching its decision under Article 52 of the Rates (Northern Ireland) Order 1977 with regard to the subject hereditament and what appears proper to it, is the Lands Tribunal entitled to exclude the hereditaments occupied by Next and New Look?'"

If, as appears to be the case, the premise of the question was that the Lands Tribunal could in its discretion exclude otherwise admissible evidence, the premise was erroneous.

[11] Ultimately, the Lands Tribunal decided that the evidence should not be excluded. In effect the Commissioner contends that the evidence was inadmissible and should not be admitted. The Tribunal concluded that it was "not entitled to exclude the hereditaments occupied by Next and New Look". The question posed by the Member in the case stated is expressed thus:

> "Was I wrong in law to conclude that I was not entitled to exclude the hereditaments occupied by Next and New Look?"

The adoption by the member of the word "entitled" reflected the rather infelicitous use of the word by the parties. The true question can be more accurately reframed to read:

> "Was evidence relating to the valuation of the hereditaments occupied by Next and New Look on which Debenhams seeks to rely as evidence of relevant comparables relevant and admissible evidence in relation to Debenhams' appeal?"

[12] As pointed out in Phipson on Evidence 18th Edition relevancy is to be distinguished from admissibility of which, though the primary, it is by no means the

sole condition. In deciding whether evidence is admissible it is correct to ask, first, whether the evidence is relevant and, thereafter, whether there are any rules or discretions based on convenience or policy which nonetheless render the otherwise relevant evidence inadmissible. The Commissioner bases his case on the proposition that the evidence relating to the valuation of the Next and New Look hereditaments was irrelevant since the valuations post-dated the relevant valuation date. He does not rely on any other policy or rule which would render inadmissible the evidence, if relevant. In this context, accordingly, if the evidence was relevant it was admissible.

[13] Phipson proposes that the test of evidential relevancy is best expressed in the statutory formulation in section 55 of the Australian Evidence Act 1995:

> "The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings."

Rule 401 of the Federal Rules of Evidence (USA) defines relevant evidence as evidence having any tendency to make the existence of any fact more probable or less probable. The Evidence Act 2006 in New Zealand states that:

> "Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceedings."

It is not necessary that the relevance of a fact should appear at the time it is proved. The court will often admit evidence on counsel's undertaking to show its bearing or admissibility at a later stage, failing which it would be disregarded. In every case the question of relevance of a particular item of evidence can be decided only by looking at it in the context of the whole of the evidence in the case. Modern courts are less concerned with degrees of probative value, taken in the abstract, than with the possible disadvantages of admitting or excluding particular items in evidence. In Clarke v O'Keefe [1997] ATP and CR 126 at 133 Peter Gibson LJ in the Court of Appeal said:

> "It was said, as long ago as 1969, by no less an authority than Megarry J in Neilson v Poole [1969] 20 P and CR 909 that the modern tendency was towards admitting evidence in boundary disputes and assessing the weight of the evidence rather than excluding it. That tendency has, in my experience not diminished in the intervening years."

As pointed out in Phipson 18th Edition at paragraph 7.16, a similar tendency has been equally apparent in most other areas of the law.

[14] These considerations support the view expressed by the court during the hearing of the appeal that this was not in reality a suitable case for a preliminary point which has interrupted the course of an already time consuming appellate process. A more suitable course would have been to have admitted the disputed evidence, completing the hearing, deciding the case and leaving it to an aggrieved party to appeal the decision during which appeal the relevance and admissibility of the evidence would have fallen for consideration and viewed in the overall context of the totality of the evidence. This more sensible course was not adopted, however. The court must determine this appeal as it currently stands. What is clear from current practice and authority is that relevance is a broad concept and courts will admit potentially or arguably relevant evidence rather than exclude it, bearing in mind that ultimately the question is what weight, if any, should be given to the evidence which a party seeks to rely on in support of his case or in support of his defence in relation to his opponent's case.

The Relevant Statutory Provisions

[15] Article 49 of the 1977 Order refers to revision of the valuation list and alteration by the district valuer as follows:

> "49. - (1) Subject to paragraph (6) and Articles 49A and 50(3), where an application is served by any person on the district valuer for revision of a valuation list in relation to any hereditament, or where the district valuer, without such an application, considers that a valuation list ought to be revised in relation to any hereditament,-
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> (a) he shall revise the list so far as it relates to that hereditament, or, if that hereditament is not already included in the list, he shall revise the list with a view to including it; and
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> (b) if, in consequence of the revision, he considers that any alteration (whether, where an application has been made, it is the alteration applied for or some other) should be made in that or any other list, he shall cause that alteration to be made.
>
> (2) Where the district valuer causes an alteration to be made under paragraph (1)(b), he shall serve

certificates of the alteration on the persons mentioned in Article 56(8).

(3) Where the district valuer, on completing a revision made following an application served on him under this Article, decides that no alteration should be made, he shall serve on the applicant notice of his decision.

(4) The district valuer shall complete any revision made following an application served on him under this Article within the period of three months from the date on which he received the application, or within such further period or periods (none of which shall exceed three months) as he specifies in a notice, stating the reason for the delay, served by him on the applicant before the expiration of the immediately preceding period.

(5) Where the date referred to in paragraph (4) falls before the first anniversary of the coming into force of the valuation list in question, that paragraph shall have effect as if the first reference in it to three months were a reference to six months.

(6) If the district valuer decides that an application served on him is frivolous or vexatious—

(a) he shall serve on the applicant notice of his decision; and

(b) sub-paragraphs (a) and (b) of paragraph (1) shall not have effect in relation to that application."

[16] Article 49A refers to the transfer to the Commissioner of an application under Article 49:

"49A. —(1) The district valuer may, with the consent of the applicant, transfer to the Commissioner an application served on the district valuer under Article 49.

(2) Where an application is transferred under this Article, the functions of the district valuer in relation to the application served on him shall be exercisable by the Commissioner."

[17] Article 50 which refers to alteration in the valuation list by the Commissioner paragraph (1) refers to the specific circumstances in which the Commissioner may make an alteration to the valuation list:

> "(1) The Commissioner may at any time-
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> (a) make in a valuation list any alteration which is necessary-
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> (i) to correct any clerical error in the list;
>
> (ii) in consequence of any alteration in a boundary that is made under the Boundary Survey (Ireland) Act 1854, the Boundary Survey (Ireland) Act 1857, the Boundary Survey (Ireland) Act 1859 or the County Boundaries (Ireland) Act 1872 or under section 50 of the Local Government Act (Northern Ireland) 1972;
>
> (iii) to give effect to any apportionment made by him under Article 40(4);
>
> (iv) to show the net annual value of the hereditaments occupied by a dock authority which are mentioned in Part X of Schedule 12 or by a holder of a licence or an exemption under Part II of the Electricity (Northern Ireland) Order 1992 or Part II of the Gas (Northern Ireland) Order 1996 or by a water undertaker or sewerage undertaker;
>
> (b) alter a valuation list by deleting from it any hereditament which he is satisfied has ceased to exist."

[18] Article 51 provides for appeals to the Commissioner against alteration of, or decision not to alter, the valuation list, or review by the Commissioner of certain alterations made by him in the list. Article 51(1) provides:

> "Any person other than the Department who is aggrieved by an alteration which the district valuer has caused to be made in a valuation list may, within

twenty-eight days of the service on him of the certificate of alteration appeal to the Commissioner against the alteration."

[19] Article 52 refers to the procedure on appeal to the Commissioner. Article 52(1) and (4) provide:

> "52. - (1) Without prejudice to Article 53, where an appeal is made to the Commissioner under Article 51, the Commissioner shall investigate the subject matter of the appeal, and shall review the alteration that has been made or, as the case may require, shall review the decision not to cause the alteration applied for to be made.
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> …
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> (4) After completing his review, the Commissioner shall make such decision with respect to the manner in which the hereditament in question is to be treated in a valuation list as appears to him to be proper; and where that treatment requires an alteration the Commissioner—
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> (a) shall alter that list accordingly; and
>
> (b) may make such alteration in any valuation list in relation to any comparable hereditament which is in the same state and circumstances as the first-mentioned hereditament as appears to him to be necessary in order to render the valuations of that hereditament and the first-mentioned hereditament proportionate and uniform."

[20] Article 54 refers to appeals from the decision of the Commissioner:

> "54. (1) Any person, other than the Department, who is aggrieved by—
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> (a) the decision of the Commissioner under Article 49A or on an appeal under Article 51; or
>
> (b) an alteration made by the Commissioner in a valuation list in consequence of such a decision,

> may appeal to the appropriate Tribunal.
>
> (2) On an appeal under this Article the Tribunal may—
>
> (a) make any decision that the Commissioner might have made; and
>
> (b) if any alteration in a valuation list is necessary to give effect to the decision, direct that the list be altered accordingly.
>
> (3) On an appeal under this Article, any valuation shown in a valuation list with respect to a hereditament shall be deemed to be correct until the contrary is shown."

[21] Part I of Schedule 12 refers to the general rule in respect of the basis of valuation. Paragraph 2(1) of Schedule 12 provides:

> "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."

The parties' submissions

[22] Mr Shaw on behalf of the Commissioner submitted that the Lands Tribunal was prevented from considering comparables post-dating the relevant valuation date. The valuation tax tasked to be performed by the District Valuer is of central importance and this task is the focus of the Commissioner and/or the Tribunal on any transfer or appeal. The ordinary and natural meaning of paragraph 2 of Schedule 12 of the 1977 Order is that the list to which the District Valuer must have regard is the list as it stands at the appropriate valuation date. The list at the valuation date of 19 September 2008 did not include the hereditaments which the Member considered potentially relevant in the appeal. The Commissioner must only consider the NAV list to which the District Valuer had reference and not a later or different list. To hold otherwise would mean that at each stage of an appeal each decision maker would consider a list that differed from that considered by the decision maker below. This would promote inconsistency and uncertainty outwith the proper reading of the 1977 Order. Relying on Dawkins (Valuation Officer) v Ash Bros and Heaton Ltd [1969] 2 AC 366 and McKeown Vintners Ltd v Commissioner

of Valuation for Northern Ireland [5 April 1991] counsel contended that the focus in rating review cases is on finding a hereditament in its correct place in the existing NAV list. This is to be done by comparing the hereditament in question with other hereditaments in that list that are same state and circumstances. The statutory construct requires focus to be had on the list and not on the market and in this regard rating review cases were to be distinguished from rent review and compulsory purchases cases.

[23] Mr Beattie on behalf of Debenhams said that the appellant's sole rationale for the exclusion of Next and New Look was because both premises were entered into the list after the District Valuer's certificate dated 18 September 2008. The Next and New Look Valuations were in the list as of November 2011 and before the hearing of the appeal in respect of the Debenham's hereditament. Counsel argued that there was no provision in the 1977 Order excluding from consideration any property that was in the list. The Commissioner's investigative procedure did not provide time limits or cut off dates when properties on the list could or could not be taken into account. Counsel posed the question: why should the properties which were valued subsequent to the valuation of Debenhams' hereditament not be taken into account? The respondent contended that there was no statutory provision that the Tribunal or anyone else should ignore the contents of the list when an assessment was being made. This, it was argued, extended to the respondent's appeal rights before the Tribunal. If the legislature intended evidence material to the report from the Commissioner should be ignored the 1977 Order could and indeed was required to say so. Both valuations for Next and New Look were in the list at the time of the appeal. It would be absurd to require the Tribunal to ignore parts of that list on a time basis which has no support in the statutory framework. Article 54 of the 1977 Order gave the Tribunal the same powers as the Commissioner. It provides a directory power to amend the valuation list. Counsel argued that the Commissioner was seeking to fetter that power by requiring the Tribunal to ignore material evidence that suggested unfairness or irrationality in the list at the time of an appeal before it. The Commissioner's concern to narrow rather than widen the scope of inquiry flew in the face of the power and the requirement to have regard to proportionality and uniformity throughout the list as provided for in the statute.

Conclusions

[24] In McKeown Vinters Ltd v The Commissioner of Valuation for Northern Ireland [VR-9-1995] and in the Trustees of Glenkeen Orange Hall v The Commissioner of Valuation for Northern Ireland [VR-31 1993] Judge Gibson QC as President of the Tribunal and Mr Curry as Member of the Tribunal respectively provided illuminating expositions of relevant legal principles relating to the valuation of hereditaments for rating purposes. Lord Pearce in Dawkins (Valuation Officer) v Ash Bros and Heaton Ltd [1969] 2 AC 366 at 381-382 set out the matter thus:

> "Rating seeks a standard by which every hereditament in this country can be measured in relation to every other hereditament. It is not seeking to establish the true value of any particular hereditament, but rather its value in comparison with the respective valuers of the rest. Out of various possible standards of comparison that has chosen the annual letting value. This is appropriate since the tax is charged annually. One therefore has to estimate "the rent at which the hereditament might reasonably be expected to let from year to year" the tenant paying rates repairs etc. This standard must be universal even though in many cases it demands various hypothesis."

As Lord Pearce's comments show, there is an inevitable issue of relativity within a class in the valuation list.

[25] The fact that there has to be a determination of a hereditament's valuation made by way of comparison with the respective valuations of the rest of the hereditaments in the list demands that the focus is not on the current true value but on achieving a proportional and uniformly balanced valuation of properties inter se. At the time of a general revaluation there can be no entries of NAVs until all hereditaments have been assessed and thus at that stage there are no net annual values of comparable hereditaments in the list. As Judge Gibson QC pointed out in McKeown Vinters, at the stage of general revaluation the concept of comparables (which underpins paragraph 2(1) of Schedule 12 of the 1977 Order) cannot play any part in the assessment process. When, however, a revision of an entry in a valuation list arises for consideration at a later stage different principles come into play, in particular the principle of comparability under paragraph 2(1). The completion of the list at the general revaluation by itself creates comparables. At that stage paragraph 2(1) begins to have a role to play. As time progresses, if actual rental values and turnover figures were used in the revision of a particular entry in the valuation list, it would inevitably result in that entry being increased to a level significantly different from other entries in the list. As Judge Gibson QC pointed out, there must be a limiting factor and that is provided by paragraph 2(1) which produces what is often termed a tone of the list or, as Mr Curry described it in Glenkeen, a "tone of the comparables" so as to ensure fairness and uniformity to meet the issue of relativity to which Lord Pearce refers. Judge Gibson QC further pointed out that Article 54(2) imposes an onus on the rate-payer to prove that an entry in the list is incorrect. This has been construed as meaning that all entries in the valuation list are deemed correct until the contrary is shown. The combination of Article 54(2) and paragraph 2(1) underpins the tone of the list.

[26] The central issue raised in this appeal is whether, as Mr Shaw asserts, the Commissioner was bound to close his eyes to the 2009 valuations and in the result

the NAVs ascribed to Next and New Look, or whether, as Mr Beattie asserts, they form part of the relevant corpus of valuation evidence to which regard should be had in determining whether the valuation of Debenhams was excessive. A key point in the rate-payer's case is that, whereas in the case of Debenhams, the District Valuer adopted a *zoning* method of valuation in a case of the 2009 NAVs he adopted an *overall* valuation approach which resulted in what appears to be a lower valuation in particular in relation to New Look (£190,000 in relation to a unit of 1,622 square metres) compared to Debenhams £225,000 (a hereditament with an area of 1,507 square metres with what Debenhams contends are comparable characteristics).

[27] In Pointer v Norwich Assessment Committee [1922] 2 KB 471 Atkin LJ said:

> "I confess that I do not quite appreciate the view taken by Salter J that while you may give evidence of the actual rent paid for the other premises you may not give evidence of their rateable value. In my opinion, evidence of the rate of a value must be admissible, and for two reasons. In the first place, in cases in which both premises are in the same Union, it is evidence against the Assessment Committee in the nature of an admission. And, secondly, it may be the only way in which you can get at the rent at which the appellant's premises are worth to let by the year."

[28] When the District Valuer carried out his valuation in relation to Debenhams' hereditament he had evidence from the valuation of other hereditaments in the valuation list at that time. In assessing the appropriate NAV he had to have regard to the tone of the list emerging from the existing entries. When the matter went on appeal to the Commissioner there existed at that stage entries in relation to the Next and New Look hereditaments. Under Article 52 the Commissioner has a duty to investigate the subject matter of the appeal. Under Article 52(4)(b) he may:

> "make such alteration in any evaluation list in relation to any comparable hereditament which is in the same state and circumstances as the first mentioned hereditament as appears to him to be necessary in order to render the valuations of that hereditament and the first mentioned hereditament proportionate and uniform."

This reference to the objective of ensuring proportionality and uniformity in the valuation of hereditaments inter se is in line with the principle of tone of the list. A valuation of the hereditament which is too high or too low having regard to the tone of the list would result in a lack of proportionality and uniformity with the current valuation list. This is equally true of valuations both before and after 19 September 2008. If the Commissioner's argument were correct, the Commissioner would have

to close his eyes to valuations after 19 September 2008 and ignore later valuations notwithstanding that that might result in a lack of uniformity and disproportionality in the overall list.

[29] A duty to investigate requires the decision maker to carry out a systematic enquiry into the subject matter of the investigation set in its overall context. Article 52 does not in terms limit the field of enquiry. The Tribunal on appeal has the same powers as the Commissioner under Article 54(2). Mr Shaw, however, seeks to limit the wide investigatory role of the Commissioner by contending that since the Commissioner is reviewing the District Valuer's decision and since the Commissioner can only take account of evidence up to 18 September 2008 the Commissioner is precluded from looking at material not available to the District Valuer. There is nothing in the wording of Article 52 to compel such a restrictive view of the ambit of the Commissioner's investigation. Such an approach proceeds on the premise that in determining whether the valuation in respect of Debenhams' hereditament nothing appearing in the valuation list after 18 September 2008 can be looked at or considered. It ties the valuation to 18 September 2008. However, while the date of valuation was 18 September 2008, what was being assessed was the appropriate NAV having regard not to what the actual current value of the premises was at the date of the assessment on 18 September 2008 but rather it was a valuation moderated by the tone of the list which will produce a valuation not current at the date of assessment. In words of Lord Pearce in Dawkins its value is in comparison to the respective values of the rest of the hereditaments on the list. Once that point is properly understood, the valuation date of 18 September 2008 ceases to be the limiting factor for which Mr Shaw contends. Valuations after 18 September 2008 must have been assessed in the light of the tone of the list (or the tone of comparables, to use Mr Curry's words,) and they, too, must have been intended to meet the objective of a uniform and proportionate set of valuations to which tone of the list speaks.

[30] It cannot be said that evidence which the rate-payer wishes to adduce in relation to the NAVs of Next and New Look has no potential relevance. The rate-payer must be entitled to pursue its evidence and present its case in the way it wants to make good its challenge to the NAV attributed by the District Valuer to Debenhams' hereditament. A district valuer's valuation, whether earlier or later, may give rise to an argument that the district valuer has effectively admitted that his valuation of Debenhams was too high (see Atkin LJ in Pointer). Debenhams must be entitled to lead the evidential basis upon which it seeks to rely for cross-examining the District Valuer on his valuation evidence. Whether the evidence relating to the later NAVs will make any difference remains to be assessed. The weight, if any, to be attached to this material will be a matter for the Tribunal. As already noted, questions of admissibility and weight must not be confused. In the present case the Commissioner cannot establish that the evidence relating to the later NAVs is so clearly irrelevant that it should be excluded.

[31] In the result the reformulated questions set out in paragraph 11 must be answered "Yes".

COGHLIN LJ

I agree

HIGGINS LJ (HIG9339)

[1] This is an appeal by way of case stated from a decision of the Lands Tribunal on a preliminary point of law in an appeal from the Commissioner for Valuation (the Appellant) to the Lands Tribunal. The Respondent to the appeal to this Court is Debenhams plc who occupy a hereditament at Unit 13, Fairhill Shopping Centre, Ballymena (the hereditament).

[2] On 19 September 2008 (the Valuation Date) the District Valuer issued a certificate revising the Net Annual Valuation (NAV) List to include within the List the hereditament at Unit 13. This was a revision of the NAV List by the District Valuer on his own initiative, as permitted under Article 49 of the Rates (Northern Ireland) Order 1977 (the Order). Thus the certificate issued by the District Valuer was an alteration to the Valuation List.

[3] The Respondent appealed the decision of the District Valuer to the Commissioner of Valuations for Northern Ireland (the Appellant) who by a decision dated 31 August 2011 dismissed the appeal. On 12 September 2011 the Respondent appealed to the Lands Tribunal under Article 54 of the Order. Between 6 and 8 June 2012 the Lands Tribunal heard oral expert evidence from chartered surveyors on behalf of each party and was invited to consider evidence about the NAVs and the physical layout and dimensions of other hereditaments within the Fairhill Centre. Over several months following the June hearing the Tribunal received submissions from the parties as to whether it should receive evidence relating to the NAV of two separate properties which had been entered in the List thirteen months after the entry on the 19 September 2008 relating to the Respondent's hereditament. Thus these two hereditaments had not been considered by the District Valuer in his decision dated 28 September 2008 nor by the Commissioner for Valuations in his decision dated 31 August 2011 as they had not been entered in the Valuation List at the date of those decisions. On 24 May 2013 the Lands Tribunal ruled that the Tribunal was not entitled to exclude evidence relating to the two later entries in the List. On 30 May 2013 the appellant applied to the Tribunal to state a case for the opinion of the Court of Appeal on the following question –

[4] Was the Tribunal wrong in law to conclude that it was not entitled to exclude the hereditaments occupied by Next and New Look.

[5] Special rules apart, the admission or exclusion of evidence depends upon whether it is relevant to the matter in issue before the court or tribunal. Therefore the question posed for this court raises the issue as to the nature of the proceedings and the issues raised in the hearing before the Tribunal.

[6] The Rates (Northern Ireland) Order 1977 consolidated earlier rates legislation and provides a Code for the levying of rates and appeals therefrom. Part III created the Valuation Office and the Valuation Tribunal and makes provision for Valuations, the Valuation Lists and Alterations to that List. The Valuation Office comprises the Commissioner for Valuation, the District Valuers and the Valuation Office. Article 38 empowers the Commissioner and the District Valuers to conduct such general revaluations of hereditaments as are necessary for the preparation of a new valuation list as the Department may determine under Article 45. That new valuation list comes into force on the 1 April next following the day on which it is published (Article 45(2)). The new valuation list may be altered by the Commissioner or the District Valuer after publication but before it comes into force, but not afterwards (Article 45(5)). The last general revaluation came into force on 1 April 2006.

[7] Article 39 provides that every hereditament shall be valued upon an estimate of its net annual value. Article 40 requires the Commissioner to maintain a list of hereditaments to be valued upon an estimate of their net annual value (the NAV List) which he may alter from time to time in accordance with Part III of the Order. Article 40 also provides –

> "5. Subject to any alteration duly made under this Part, every NAV List shall remain in force until it is superseded by a new NAV List.
>
> 6. No alteration shall be made in a valuation list except by the Commissioner in accordance with the provisions of this Order or to give effect to an order of a court of competent jurisdiction."

[8] Schedule 12 makes provision for the Basis of Valuation in these terms.

> "SCHEDULE 12
>
> 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.

3A.-(1) In estimating the net annual value or capital value [am.1 Oct 2011] of a relevant hereditament during a deemed completion period, the actual state of the hereditament shall be taken to be a state of reasonable repair excluding any repairs which a reasonable landlord would consider uneconomic.

(2) In this paragraph-

'building' has the same meaning as in Article 25B;
'deemed completion period' means the period-

(a) beginning with the day on which the building is deemed to be completed by virtue of paragraph (2) of that Article; and

(b) ending on the day on which the building becomes capable of rateable occupation;

'relevant hereditament' means a hereditament which comprises a building which is deemed to be completed by virtue of that paragraph."

[9] Article 49 (1) empowers a District Valuer upon application by any person, or without such application, to revise the list so far as it relates to a specific hereditament and to alter that list or any other list as a consequence of that revision. Where application is made to the District Valuer to revise a list he may transfer the application to the Commissioner (Article 49A). Article 50 makes provision for alteration in a valuation list by the Commissioner but only in limited circumstances. Article 51 makes provision for an appeal to the Commissioner against an alteration which a District Valuer has caused to be made in a valuation list. It provides –

> "51. - (1) Any person other than the Department who is aggrieved by an alteration which the District Valuer has caused to be made in a valuation list may, within twenty-eight days of the service on him of the certificate of alteration appeal to the Commissioner against the alteration.
>
> (1A) Any person other than the Department who is aggrieved by a decision of the District Valuer not to cause a valuation list to be altered in consequence of an application by him for the revision of that list may, within twenty-eight days from the date of service on him of the notice of the decision, appeal to the Commissioner against the decision.
>
> (1B) Paragraph (1A) does not apply to a decision under Article 49(6).
>
> (2) Any person, other than the Department, who is aggrieved by an alteration made in a valuation list by the Commissioner under Article 50(1)(a)(i) or (b) may, within twenty-eight days from the date of service on him of the certificate of the alteration, apply to the Commissioner for a review of the alteration; and in the succeeding provisions of this Order any reference to an appeal to the Commissioner includes a reference to an application to him for a review under this paragraph or, as the case may require, to such a review, and references to an appellant or to hearing or determining an appeal shall be construed accordingly.
>
> (3) An appeal to the Commissioner shall be instituted by a notice of appeal, signed by the appellant, stating-
>
> (a) the alteration desired or objected to;

(b) the reasons for desiring or objecting to the alteration; and

(c) where the appellant is not the owner, or is not the occupier, of the hereditament, the name and address of the owner, or, as the case may require, of the occupier or of both.

(4) The appellant shall, within the period of twenty-eight days mentioned in paragraph (1), (1A) or (2) (whichever is applicable), serve a copy of the notice of appeal on-

(a) the occupier of the hereditament to which the appeal relates, where not the appellant; and

(b) the owner of the hereditament, where he is not the occupier or the appellant.

(5) The appellant may, at any time before the Commissioner's decision on the appeal has been issued, abandon the appeal by serving a notice in that behalf on the Commissioner."

[10] The duty of the Commissioner to whom an appeal is made is set out in Article 52 in these terms –

"52. - (1) Without prejudice to Article 53, where an appeal is made to the Commissioner under Article 51, the Commissioner shall investigate the subject matter of the appeal, and shall review the alteration that has been made or, as the case may require, shall review the decision not to cause the alteration applied for to be made.

(2) In the course of his investigation the Commissioner shall afford to every person who appears to him to be concerned therewith an opportunity to comment on the subject matter of the appeal and to furnish oral or other evidence respecting it.

(3) Without prejudice to paragraph (2), the Commissioner may obtain information from such persons and in such manner and make such inquiries as he considers appropriate, and may call for a report

on the hereditament to which the appeal relates from a suitably qualified officer other than the officer previously employed-

(a) in making the valuation originally included in the valuation list in question, or

(b) in deciding not to cause to be made any alteration which was applied for, or

(c) in causing to be made any alteration in relation to which the appeal is made.

(4) After completing his review, the Commissioner shall make such decision with respect to the manner in which the hereditament in question is to be treated in a valuation list as appears to him to be proper; and where that treatment requires an alteration the Commissioner-

(a) shall alter that list accordingly; and

(b) may make such alteration in that list in relation to any comparable hereditament which is in the same state and circumstances as the first mentioned hereditament as appears to him to be necessary in order to render the valuations of that hereditament and the first-mentioned hereditament proportionate and uniform.

(4A) Where the valuation list is a capital value list—

(a) the Commissioner shall complete his review and make his decision under paragraph (4)—

(i) within twenty-eight days from the date of service on him of the notice of appeal under Article 51; or

(ii) within such further period or periods (none of which shall exceed twenty-eight days) as he specifies in a notice, stating the reason for the delay, served by him on the appellant before the expiration of the immediately preceding period; and

(b) the Commissioner shall for the purposes of paragraph (4)(b) have regard to the assumptions mentioned in paragraphs 9 to 15 of Part 1 of Schedule 12 (subject to paragraphs 7(3) and 12).

(4B) Where the date referred to in paragraph (4A)(a)(i) falls before the first anniversary of the coming into force of the capital value list in question, that paragraph shall have effect as if the reference in sub-paragraph (a)(i) to twenty eight days were a reference to six months.

(5) Where the Commissioner alters any valuation list under paragraph (4)(a) or (b) he shall serve certificates of the alteration on the persons mentioned in Article 56(8).

(6) Where the Commissioner-

(a) dismisses the appeal; or

(b) makes in relation to the hereditament in question any alteration other than that desired by the appellant;

he shall serve notice of the dismissal or, as the case may require, a statement of his reasons for making that other alteration, on-

(i) the appellant;

(ii) the district council, where not the appellant and if requested by the council to do so; and

(iii) every other person on whom a copy of the notice of appeal was served who submitted comments or furnished evidence to the Commissioner in connection with the appeal.

[11] Article 54 provides that any person aggrieved by a decision of the Commissioner on appeal from the District Valuer may appeal to the Lands Tribunal. On appeal the Lands Tribunal may make any decision that the Commissioner might have made. Article 55 provides for a review by the District Valuer following the disposal of an appeal by the Lands Tribunal. It is in these terms –

"55.(1) When an appeal under Article 54 or 54A in relation to a hereditament is finally disposed of, the District Valuer shall review any alteration in, or decision not to alter, a valuation list in relation to the hereditament or any revaluation of the hereditament which was made-

(a) subsequent to the date of the alteration in a valuation list , or the refusal to make such an alteration, which gave rise to the appeal; but

(b) before the date on which the appeal was finally disposed of;

having regard to the decision on the appeal.

(2) Where, on a review under paragraph (1), the District Valuer is satisfied that any alteration should be made in a valuation list in relation to the hereditament, he shall cause that valuation list to be altered accordingly.

(3) Where the District Valuer causes a valuation list to be altered under paragraph (2), he shall serve certificates of the alteration on the persons mentioned in Article 56(8); and where, on completing his review under paragraph (1), he decides that no alteration should be made in a valuation list, he shall serve notice of his decision on the occupier of the hereditament and the district council.

(4) The occupier of the hereditament, or the district council, may appeal to the Commissioner against any alteration made in a valuation list under paragraph (2), or any decision of the District Valuer such as is referred to in paragraph (3), and the provisions of Articles 51 to 54A shall, with the appropriate modifications, apply in relation to an appeal under this paragraph.

[12] An oral hearing was conducted before the Lands Tribunal in which the Tribunal Member received expert evidence from chartered surveyors for each party and was invited to consider evidence about other hereditaments within the Fairhill Shopping Centre. It was agreed before the Tribunal that the relevant valuation date was 19 September 2008. The Respondent contended that the Tribunal should

consider the NAVs of the Next and New Look hereditaments also within the Fairhill Shopping Centre. These hereditaments had been entered in the Valuation List on 19 October 2008. These had not been considered by the Commissioner on appeal from the District Valuer as they were not in the list when the appellant's hereditament was entered in the list nor at the relevant valuation date.

[13] It was submitted by the appellant that the Tribunal was entitled (if not obliged) to exclude them from consideration. The Tribunal accepted that the valuation must reflect the state and circumstances of the hereditament at the valuation date and was of the view that it was constrained to look at the circumstances that pertained at that date in properly performing its valuation exercise. It was agreed that this issue should be treated as a preliminary point and the Tribunal after written submissions concluded that under Article 52 it was not entitled to exclude the hereditaments occupied by Next and New Look.

[14] Before this court it was submitted by the appellant that the Tribunal was not empowered to consider comparables entered in the list after the valuation date. The power to revise the NAV List rests with the District Valuer, not with the Commissioner or the Lands Tribunal. Revision can only come before the Commissioner or the Lands Tribunal upon appeal or transfer. Where a matter is transferred the functions of the District Valuer are exerciseable by the Commissioner, see Article 49A(2) or the Lands Tribunal. Schedule 12 paragraph 2 provides that in estimating the NAV of a hereditament for the purposes of any revision of a valuation list, regard shall be had to the NAVs in that list, that is the list as it stands at the valuation date. Otherwise the Commissioner or the Lands Tribunal would be considering a different list at a different time. On behalf of the Respondent it was submitted that Article 52(4) empowers the Commissioner to investigate and review the alteration to the list made by the District Valuer and to make such decision as appears to him to be proper and to make such alteration as appears to be necessary to render the valuations proportionate and uniform. The 1977 Order and Schedule 12 in particular contain no exclusion of other hereditaments or constraints in regard to the date or time of any list nor do they require the Commissioner or the Tribunal to ignore a list at the time when an appeal is being considered. The Tribunal has in addition to the same powers as the Commissioner, the discretion to direct that the valuation list be amended. To hold otherwise would fetter the powers of the Tribunal and require it to ignore any material that suggested unfairness or irrationality in the list.

[15] Article 49 authorises a District Valuer to alter or revise a valuation list. Where he does so he alters or revises the valuation list as it stands at that point in time. Schedule 12 makes provision for the Basis of Valuation. Part I describes the General Rule and Paragraph 2 expresses the manner in which District Valuer sets the NAV, by having regard to comparable hereditaments in that list which are in the same state and circumstances as the hereditament being revised. That identifies the list which he has considered as the list as it stood at that point in time. Any person who is aggrieved by that alteration (whether by revision or alteration) in a valuation list

may appeal against the alteration to the Commissioner. The appeal is in relation to the valuation list as it stood before the District Valuer. The appeal is instituted by a Notice of Appeal which must state the alteration objected to, that is the alteration in the list as it stood before the District Valuer and the reasons why objection is made to the alteration in that list. Article 52 provides for the procedure on appeal to the Commissioner. Article 52(1) provides that the Commissioner shall investigate the subject matter of the appeal. The subject matter of the appeal is the alteration made in the list as it stood before the District Valuer. In addition he is empowered to review the alteration made, that is the alteration that has been made by the District Valuer in the list before him. In addition he may obtain information from such persons as he considers appropriate and make such inquiries as he considers appropriate and obtain a report by a suitably qualified officer on the hereditament to which the appeal relates. Significantly he cannot call for a report from the suitably qualified officer, that includes the District Valuer, who made the original valuation in the list or alteration in the list. After completing his review the Commissioner shall make such decision as to the manner in which the hereditament in question is to be treated in a valuation list as appears to him to be proper. Where that treatment requires an alteration in that list the Commissioner shall alter that list. In addition the Commissioner may as a consequence of any alteration in the list in respect of that hereditament make such alteration in any valuation list in order to render the valuation proportionate and uniform. The Lands Tribunal has all the powers which the Commissioner has. Thus the issue is which list is the Commissioner considering at each stage of this appellate process. If the list is the list considered by the District Valuer then evidence in relation to other hereditaments later added would be excluded.

[16] If the list is the list as it stands at the point in time at which the appeal is being considered by the Commissioner then it is a different list from the one considered by the District Valuer and the Commissioner would be carrying out a different task from the one performed by the District Valuer. Thus an appeal to the Commissioner would result in a general re-evaluation of all the hereditaments as they stood in the list at that point in time.

[17] The final disposal of an appeal is not the end of the matter. Under Article 55 the District Valuer is obliged to review any alteration in a valuation list in relation to the hereditament which was made subsequent to the date of the alteration in a valuation list which gave rise to the appeal but which was made before the date on which the appeal was finally disposed of. This applies even where the decision on appeal is not to alter the valuation list. Thus in the present appeal if the Commissioner or Lands Tribunal altered the list as considered by the District Valuer or did not alter it, the District Valuer would be obliged to review the alteration made in the list as a consequence of the alteration resulting from the valuations determined in respect of the two other properties in the Fairhill Complex. Where after review he is satisfied that an alteration in relation to the hereditament (Debenhams) should be made as a result of the valuations in relation to the additional two hereditaments he shall make that alteration. Thus the legislation

prompts a review as a result of any alteration in the valuation list during the appeal process. If any alteration in the list could be dealt with in the appeal process as suggested in this appeal, Article 55 would be rendered superfluous. The presence of Article 55 strongly supports the view that in the appeal process the list under consideration is the list as it existed before the District Valuer at the date of his decision. In addition if every appeal to the Commissioner or the Tribunal led to a consideration of all alterations to the list from the date of the original valuation in order to determine the valuation of the hereditament the subject of the appeal, then the requirement for a settled list between general revaluations (what is referred to as the 'tone of the list') would quickly disappear. The concept of the settled list or tone of the list has been in existence for some time and was in fact included as a recognised concept in the General Rate Act 1967 (see section 20) in England and Wales. In Dawkins (Valuation Officer) v Ash Brothers and Heaton [1969] 2 AC 366 Lord Pearce having referred in the opening lines of his judgment to the fiction involved in rating, underlines the necessity for a standard rather than the true measurement for rating purposes at page 381.

> "The question here is whether reduction in value due to an impending demolition order comes within that area of rating where realities are acknowledged or within that where necessarily fiction prevails over fact. It is near the border-line which separates those areas. One has a natural inclination to prefer reality to fiction if and where this is compatible with the basis of rating, with the statute, and with the cases. Rating seeks a standard by which every hereditament in this country can be measured in relation to every other hereditament. It is not seeking to establish the true value of any particular hereditament, but rather its value in comparison with the respective values of the rest. Out of various possible standards of comparison it has chosen the annual letting value. This is appropriate since the tax is charged annually. One therefore has to estimate "the rent at which the hereditament might reasonably be expected to let from year to year," the tenant paying rates, repairs, etc. This standard must be universal even though in many cases it demands various hypotheses. In practice, sewage works, portions of railway lines, shops and factories where heavy and valuable machinery is installed are not let from year to year. So one must assume a hypothetical letting (which in many cases would never in fact occur) in order to do the best one can to form some estimate of what value should be attributed to a hereditament on the universal standard, namely a letting "from year to

> year." But one only excludes the human realities to a limited and necessary extent, since it is only the human realities that give any value at all to hereditaments. They are excluded in so far as they are accidental to the letting of a hereditament. They are acknowledged in so far as they are essential to the hereditament itself. It is, for instance, essential to the hereditament itself that it is close to the sea and that humans will pay more highly for a house close to the sea. One can therefore take that into account in the hypothetical letting. It is, however, accidental to the house that its owner was shrewd or that the rich man happened to want it and that therefore the rent being paid is extremely high. In the same way I think it would be accidental to the hereditament that its owner intended to pull it down in the near future. For the hereditament might have had a different owner who would not pull it down. So the actual owner's intentions are thus immaterial since it is the hypothetical owner who is being considered. But when a demolition order is made by a Superior power on a hereditament within its jurisdiction different considerations apply."

[18] In this jurisdiction the concept of the 'tone of the list' was considered by His Honour Judge Gibson QC, sitting as President of the Lands Tribunal, in McKeown Vintners Ltd v Commissioner of Valuation for Northern Ireland VR-9-1985 -

> "When, however, a revision of an entry in a valuation list is under consideration different principles come into play; in particular paragraph 2(1) and the concept of comparable hereditaments. The reason is simple. The very completion of the list, at general revaluation, by itself creates comparables, and paragraph 2(1) can begin to play its role. That role is this. There can, as the Tribunal has already stated, be no challenge to the principles applied at general revaluation. Any challenge before the Lands Tribunal must be by way of an application for revision of an entry already in the list. As time progresses, if actual rental levels and turnover figures were used for the revision of a particular entry in the valuation list, it would inevitably result in that entry being increased to a level significantly higher than other entries in the list. There must therefore be a limiting factor, and this is provided by paragraph 2(1) which, in essence,

> produces what is often termed a "tone of the list", and which ensures fairness and uniformity. It does this by providing that at revision stage regard "shall be had" to the net annual values in the valuation list of comparable ereditaments. Its role will be discussed in greater detail later. Suffice to say that the significance of this role increases with the passage of time; indeed to the extent that considerable strain has been placed upon the concept of the tone of the list. In turn this has led to difficulties in applying paragraph 2(1) in the manner originally envisaged. It is a limiting factor designed to maintain uniformity over intervals of five years. However the Second General Revaluation in Northern Ireland took place in 1956, and the last General Revaluation in 1976."

[19] In passing the Rates (Northern Ireland) Order 1977 or any of its frequent amending Orders, in particular the Rates (Amendment) (Northern Ireland) Order 2006, the legislature had the opportunity to declare that the concept of a 'tone of the list' was inappropriate in rating legislation. It has not done so.

[20] The Rates (Northern Ireland) Order 1977 as amended is a self-contained enactment which provides a structured method of rateable valuations and which at the same time allows for appeals and review within the same structure. If the legislature intended to widen the scope of the review at the appellate stage it could have so stated. The fact that it did not and that it provided for an appeal from the decision below without provision for appeal by way of rehearing, merely confirms the proper interpretation of the wording of the legislation that an appeal to the Commissioner or the Lands Tribunal is an appeal directed to what was in contention below namely a valuation of the list as it stood before the District Valuer at the point in time at which he considered the valuation of the hereditament. Therefore I would answer the question posed 'Yes' - the Tribunal was wrong in law to conclude that it was not entitled to exclude the hereditaments occupied by Next and New Look and it was obliged to exclude evidence relating to such hereditaments.