VALUATION TRIBUNAL FOR ENGLAND

2017 Rating List Appeal appeals: Anaerobic Digestion plants; Renewable energy; Full receipts and expenditure; comparables; tone of the list; tenant's share; one appeal allowed and two appeals dismissed.

APPEAL NUMBERS: CHG100858911, CHG100890081, and CHG100890093

RE: A D Plant, Scottow Road, Scottow, NR10 5GD and
A D Plant, Bay Farm, Bury St Edmunds IP28 6BS

BETWEEN: Oak Grove Renewable Energy Ltd — Appellants

and

Bay Farm Power Ltd

and

Jo Moore
(Valuation Officer) — Respondent

SITTING: *remotely using Microsoft Teams*

ON: Thursday 3 April and Friday 4 April 2025

BEFORE: Gary Garland (President)

CLERK: David Slater (Registrar and Chief Clerk)

APPEARANCES: Daniel Kolinsky KC from Landmark Chambers (Appellants' Counsel)

David Kinnersely from Fisher German LLP (Appellants' Expert Witness)

Edward Bastow, Director of Oak Grove Renewable Energy Ltd and Material Change Limited (Appellants' witness of fact)

Blake Penfold (Appellants' Expert Witness)

Cain Ormondroyd from FTB Chambers (Respondent's Counsel)
Bob Prescott (Valuation Officer's Expert Witness)

DECISION AND STATEMENT OF REASONS

Decision

1. The appeal in respect of the compiled list entry for Oak Grove (CHG100890093) was allowed. The second appeal, in relation to the Valuation Officer's notice of alteration was dismissed (CHG100890081). The appeal in relation to Bay Farm (CHG10085911) was dismissed.

2. I decided that the uplift to the tenant's share of the capital assets to reflect risk should be increased from 10% to 15%, in respect of both Bay Farm and Oak Grove. As a corollary, I determined that the tenant's share for Bay Farm was 51.75% and for Oak Grove 46% respectively. As a result, the list entry for Oak Grove was reduced to £140,000 Rateable Value with effect from 1 April 2017. In the case of Bay Farm, despite increasing the tenant's share to 46%, the existing entry of £285,000 Rateable Value with effect from 9 April 2021 remained unaltered because of the effect of the valuation cap.

Introduction

3. This statement of reasons is not and does not purport to be a full verbatim record of the proceedings.

4. These appeals involve the process known as Anaerobic Digestion (AD) which is carried out at the plants involved in these hearings; the process has been called in short hand "concrete cows" . This was because the Anaerobic digester worked like a cow's stomach by breaking down feedstock and/or organic waste, with the aid of microorganisms/bacteria in the absence of oxygen, to produce biogas (primarily methane and carbon dioxide) and digestate, the latter which can be used as a fertiliser.

5. The biogas produced then underwent a cleansing process, where the carbon dioxide was removed by a series of membranes which acted as a filter. Additives were then added to the methane to ensure that it burned at the right temperature for domestic use, providing a renewable energy alternative to natural gas.

6. Alternatively, instead of the biogas going through a process to produce gas for domestic use, it could instead be used to fire a Combined Heat and Power unit (CHP) to produce electricity and renewable heat which can be used for on-site demand or fed into the National Grid.

7. The three appeals before me related to two AD plants which I heard as test cases, in order to hopefully assist the parties in the possible settlement of other outstanding appeals for other AD plants. There was one appeal made in respect of Bay Farm and two in respect of Oak Grove.

8. The Bay Farm AD plant was a mainly gas to grid plant, but it did generate some electricity. The Oak Grove AD plant was an electricity to grid plant.

9. It was common ground that the appeal properties fell to be valued using the full receipts and expenditure (R & E) method of valuation. In both cases, the issue that the parties wanted me to decide was the correct valuation approach to determine the tenant's share.

10. The valuation model for valuing AD plants was largely agreed. Chris Handel of Handel Rating Consultants, who had made the respective proposals on behalf of the Appellants, was the single point of contact at the Group Pre-Challenge Review (GPCR) for AD plants. Following GPCR discussions, respective Memorandums of Agreement were drawn up and signed by the respective parties on 27 and 28 July 2021 that were expected to last throughout the lifetime of the 2017 Rating List.

11. Both parties had helpfully reached agreement on the component parts/inputs for the R & E valuation exercise and therefore up to and including the divisible balance stage effectively all matters were agreed. Although the divisible balance was agreed, the split between the landlord's share and the tenant's share was not. The landlord's share would equate to the rent and therefore would determine what the rateable value was. It followed that the higher the tenant's share, the lower would be the landlord's share and therefore if the tenant's share was increased, the rateable value would be decreased. In cases of this nature, it was always in an appellant's interest to convince the tribunal that the tenant's share determined by the respondent valuation officer was too low.

12. When the memoranda were drawn up, the respective valuation models for both types of AD plants' starting point for arriving at the tenant's share was the capital allocation of non-rateable/rateable items. It was the landlord who provided the rateable items and the tenant's items were the non-rateable value assets, without which the hereditament could not function. In the case of Oak Grove, the split was agreed at landlord (60%), tenant (40%). In the case of Bay farm the respective agreed figures were landlord's rateable assets (55%), tenant's non-rateable assets (45%).

13. The existing valuation model acknowledged that the operator of the AD plant (the tenant) would demand more of the operating profit. The Valuation Officer had therefore added 10% to the tenant's share of the assets to reflect risk. Mr Handel was unable to agree on this aspect.

14. Both parties had agreed a forward-looking valuation model using estimates of receipts and expenditure. Although it was agreed that the appeal properties had to be valued, having regard to economic factors as at the antecedent valuation date, they had had regard to the estimated receipts and expenditure for the financial years ended 31 March 2016, 31 March 2017 and 31 March 2018 before adjustment.

Assessment history

Bay Farm

15. This appeal property was originally entered into the 2017 Rating List with an assessment of £168,000 Rateable Value with effect from 15 February 2018. The Valuation Officer subsequently increased the entry to £285,000 RV by notice of alteration (VON) with effect from 9 April 2021 because in their opinion the property was under assessed. Handel Rating Consultancy for the Appellant challenged the VON by serving a proposal on the VO on 23 September 2022. The VO's Challenge decision treating the proposal as not well founded was issued on 18 December 2023. The appellant appealed to the VTE on 3 April 2024.

16. The material day for the purposes of this appeal was 15 February 2018.

Oak Grove

17. The appeal property was originally entered into the 2017 Rating List with an assessment of £164,000 Rateable Value with effect from 1 April 2017.

18. The Valuation Officer increased the compiled list entry by notice of alteration dated 8 July 2021 to £182,000 RV with effect from the same date. Effective date restrictions meant that the increase in RV could not be retrospective.

19. Handel Rating Consultancy for the appellant made two proposals challenging both the accuracy of the compiled list entry (proposal served 20 December 2022) and the VON (also by proposal served 20 December 2022).

20. Following a VO decision notice dated 18 December 2023 the compiled list entry was reduced to £145,000 RV with effect from 1 April 2017 and effectively the latter alteration disappeared making the second appeal (CHG100890081) superfluous/redundant.

21. Both appeals were submitted on 3 April 2024 on the basis that the valuation was unreasonable. Both appeals were made against VO's revised entry of £145,000 RV with effect from 1 April 2017, in accordance with Regulation 13A of the Non-Domestic Rating (Alteration of Lists and Appeals) (England) Regulations 2009 on the grounds that the valuation for the hereditament is not reasonable.

22. As two appeals were made against the one and the same existing entry, it can be seen that one of the appeals was superfluous, this was one made against the VON and the previously existing entry of £182,000 RV with effect from 8 July 2021, which had been deleted prior to the appeal being made. The Appellant was therefore invited to withdraw this appeal (CHG100890081) but it declined to do so, wishing to reserve its options.

23. The material day for the purposes of this appeal was 1 April 2017.

Plant descriptions

24. In his expert reports, Mr Kinnersely described the plants as follows:

Bay Farm

25. The Bay Farm AD plant was a biogas plant with 2 primary digesters and 1 secondary digester which utilised around 40,000 tonnes per annum of agricultural feedstocks, wastes and residues. These were mainly maize silage & whole crop rye silages and straw but also sugar beet fines, beer waste and poultry litter, to produce the biogas which was upgraded to produce 450 CuM/hr of biomethane gas into the National Grid. This was the equivalent of circa 40,000MWh/annum of energy.

26. A Pentair Haffman biogas upgrading plant was installed on site. As part of the biogas cleaning process, carbon dioxide was captured and sold for commercial bulk uses such as greenhouses and breweries.

27. A Combined Heat Power plant (CHP) was also on site powered by the biogas. This produced electricity to power the AD and biogas upgrading plant and equipment. The heat

from the CHP was used to heat the digester tank, and a Mississippi digestate dryer which evaporates some of the water from the liquid fraction of the digestate to concentrate it.

28. The site had digestate storage in a 15,000 CuM lagoon and in an offsite lagoon of similar capacity on the Landlord's land.

29. The sileage feedstock was stored in the silage clamps on the site.

30. The construction cost of the plant was around £10 million.

31. Its principal income streams were Renewable Obligation Certificates (ROC) for the electricity and Non-Domestic Renewable Heat Incentive (RHI) for the biomethane produced.

Oak Grove

32. The Oak Grove AD plant was a biogas plant with 1 primary digester, 1 secondary digester and 1 digestate store tank. The plant utilised around 40,000 tonnes per annum of agricultural feedstocks, mainly maize silage and whole crop rye silages. These were fed into the plant with a single walking floor feeding unit.

33. The plant generated electricity for onsite operations and export from a 1,818KW CHP, a 499KW CHP and an Organic Rankine Cycle (ORC) generator of 127KW output capacity using the heat from exhaust of the larger CHP engine to drive the turbine. Both the CHPs and ORC were accredited under the Feed in Tariff (FIT) scheme.

34. The heat from the CHPs was used to heat the digester tank and also fed into two Mississippi digestate driers which evaporated some of the water from the liquid fraction of the digestate to concentrate it. This qualified for the Renewable Heat Incentive (RHI) support payments.

35. The parasitic load (the amount of power required to run the AD facility) on the plant averaged 8.4% which was lower than most plants even with both Mississippi dryers running due to the configuration of the plant.

36. The site had no other digestate storage on site and relied on third party contractors to remove digestate in a timely manner either to spread in field or store in offsite lagoons.

37. The silage feedstock was stored in the silage clamps on the site and offsite when extra capacity is required.

38. The principal income streams were the Feed in Tariff (FIT) for the electricity and electricity exported to the grid.

Relevant Law

39. The term 'rateable value' was defined in paragraph 2(1), Schedule 6 to the Local Government Finance Act 1988 (the "1988 Act") (as amended):

> The rateable value of a non-domestic hereditament (none of which consists of domestic property and none of which is exempt from local non-domestic rating) shall be taken to be an amount equal to the rent at which it is estimated the

hereditament might reasonably be expected to let from year to year on these three assumptions –

a) the first assumption is that the tenancy begins on the day by reference to which the determination is to be made;

b) the second assumption is that immediately before the tenancy begins the hereditament is in a state of reasonable repair, but excluding from this assumption any repairs which a reasonable landlord would consider uneconomic;

c) the third assumption is that the tenant undertakes to pay all usual tenant's rates and taxes and to bear the cost of the repairs and insurance and the other expenses (if any) necessary to maintain the hereditament in a state to command the rent mentioned above.

40. In respect of an appeal against an entry in the 2017 rating list, the rental levels are to be taken as those passing at the antecedent valuation date (AVD) of 1 April 2015, in accordance with the Rating Lists (Valuation Date) (England) Order 2014 (SI 2014 No. 2841). Each appeal hereditament had to be valued, having regard to factual matters at the relevant material day, in accordance with paragraphs 2 (6) and (7) of Schedule 6 to the 1988 Act.

(6) Where the rateable value is determined with a view to making an alteration to a list which has been compiled (whether or not it is still in force) the matters mentioned in sub-paragraph (7) below shall be taken to be as they are assumed to be on the material day.

(7) The matters are—

(a) matters affecting the physical state or physical enjoyment of the hereditament,
(b) the mode or category of occupation of the hereditament,
(c) the quantity of minerals or other substances in or extracted from the hereditament,
(cc) the quantity of refuse or waste material which is brought onto and permanently deposited on the hereditament,
(d) matters affecting the physical state of the locality in which the hereditament is situated or which, though not affecting the physical state of the locality, are nonetheless physically manifest there, and
(e) the use or occupation of other premises situated in the locality of the hereditament.

Discussion

The Memorandums of Agreement

41. Both parties agreed that as the occupation of AD plants was normally profitable, the appropriate method of valuation to be employed was the receipts and expenditure (R & E) method. Prior to the appellants' proposals being made, the appellants had been party, through their representative Mr Handel, to two memorandums of agreement at the Group pre-challenge review stage. One memorandum of agreement that was put before me

related to Gas to grid AD plants, which was relevant to Bay Farm. The other memorandum related to electrical AD plants and was relevant to Oak Grove. The general intention of the memorandums was to set out the majority of the inputs to calculate the income and expenditure during the lifetime of the 2017 Rating List. The purpose behind it was to provide some certainty.

42. Within each memorandum of agreement, for the valuation model's framework, certain assumptions were made and jointly agreed with regard to output, electricity sales or gas sales (depending upon the type of AD facility), Climate Change Certificate Income, embedded benefits, deferment of Renewable Obligations Certificate income to reflect the timing of its receipt contract discount to the electricity export income to reflect the cost of trading under the Power purchase agreement and other income sources where relevant like gate income, digestate sales, green gas certificate income and the renewable heating incentive.

43. With regard to operating expenditure, the valuation model adopted costs based on the respective AD plant's capacity.

44. Ultimately, the parties having reached agreement on the inputs that needed to be included to calculate the total receipts and expenditure, the divisible balance (gross profit minus working expenses) for each appeal property was agreed.

45. When it came to dividing the divisible balance between the tenant's share and the landlord's share (which would be the rent), it was agreed that the starting point for the "tenant's share" was the capital allocation of the assets non-rateable/rateable. The non-rateable assets were provided by the tenant, and the landlord provided the rateable assets. In the case of Bay Farm, the starting point for the "tenants share" was 45% of the total assets. In the case of Oak Grove, the starting point for the "tenant's share" was agreed at 40%.

46. In order to calculate the "tenant's share", the valuation model acknowledged that an operator would demand more of the operating profit and therefore an addition was required to inflate the starting figure (proportion of the tenant's assets) to reflect risk.

47. It was at this point, where the parties to the Memorandum of Agreement were unable to agree. The Valuation Officer had adopted a standard addition of 10% to reflect risk which meant that the tenant's share of the divisible balance was 49½% in respect of Bay Farm and 44% in respect of Oak Grove. The Appellants being of the view that the Valuation Officer's calculation was insufficient to compensate the tenants for the risks.

48. Given that the parties agreed that the appeal properties should be valued by the R & E method and it was only the division of the divisible balance that was in dispute, I found the following authoritative guidance helpful;

49. In the House of Lords' judgment in *Railway Assessment Authority v Southern Railway* [1936] AC 366, the fair and just division of the divisible balance and the tenant's share was considered in detail. On pages 24 and 25 of the judgment, Viscount Hailsham L.C. stated

> They contend that the reference to a fair and just division of the net receipts shows that the old method of ascertaining the rent which the tenant is prepared to pay, must be abandoned, since that basis of calculation provides for the tenant receiving his share of the net receipts before the landlord gets anything, and might, in some

cases, involve the landlord getting nothing; and they point out that the conception of a division of the net receipts is inconsistent with the ordinary relationship of landlord and tenant.

My Lords, I am quite unable to accept this argument. It is true that the expression "division of the net receipts" is not a very happy phrase to describe the deduction from the net receipts of the amount necessary to induce the hypothetical tenant to embark upon the enterprise, but I see no justification in that fact for altering the conception of the relationship of landlord and tenant to a conception of joint adventurers, an alteration which is really involved in the appellants' argument. The explanation of the use of the word "division" is probably to be found in the fact that it was the usual expression in rating law at the date of the Act, and that, if the amount which the tenant would require in order to induce him to take and operate the hereditaments is properly ascertained and deducted from the total net receipts, the result is to divide the net receipts fairly and justly between landlord and tenant, even though, in an extreme case, the landlord's share might be nothing at all. It is the rent which is to be estimated in such a way as to represent a fair and just division, and it is evident that the rent and nothing else is to be the landlord's share. When this is ascertained, the balance is the tenant's share of the net receipts. The "division," therefore, is not to be an aliquot division on some unspecified basis but is to be the result of a process involving the ascertainment of the landlord's share in the form of rent.

50. In *Hong Kong Electric Co Ltd v Commissioner of Rating and Valuation* [2011] RA 399, Lord Millett NPJ also considered the division of the divisible balance and had the following to say in paragraphs 154 onwards;

> 154. The second step is to divide the divisible balance between the hypothetical landlord and the hypothetical tenant. This forms the central issue in the present case. The division must be accomplished by determining the amount of the hypothetical tenant's share and deducting it from the divisible balance. The hypothetical tenant's share represents the sum that provides him with a reasonable return on his capital and a reward for his efforts and risks sufficient to induce him to rent the tenement *(hereditament)* and embark on the enterprise. What is left over is *prima facie* (see paragraph 159 below) the rent.
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> 155. This process is based on the economic view of rent as a residual payment and the hypothetical tenant's share as the "first charge" on the returns of the undertaking. The latter expression implies that it is a minimum and not a maximum. Although it is regarded as the first charge on the divisible balance, the valuation must properly reflect the relative strengths and weaknesses of the hypothetical landlord and the hypothetical tenant as they negotiate the rent. The amount that the hypothetical landlord would demand and the hypothetical tenant would be willing to pay will reflect their relative bargaining power.
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> 156……
> 157……
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> 158. No rules are prescribed for the manner in which the hypothetical tenant's share of the divisible balance may be determined. The Guidance Note produced by the English Joint Professional Institution's Rating Forum in July 1977 described four possible ways in which the exercise might be carried out; by taking (a) a percentage

of the hypothetical tenant's capital; (b) a percentage of gross receipts; (c) a percentage of the divisible balance or (d) a "spot" figure. The choice is a matter for valuation judgement for the Lands Tribunal. It chose (c).

159. The receipts and expenditure method is only an aid to the ascertainment of the rent which the hypothetical tenant would be willing to pay; it is not an inflexible code or set of rigid rules. The valuation must take account of "every intrinsic quality and every intrinsic circumstance which tends to push the rental value either up or down" (see *Robinson Brothers (Brewers) Ltd v Houghton and Chester Le Street Assessment Committee* [1937] 2 KB 445). The methodology must be sufficiently flexible to accommodate any feature which affects the amount of rent, whether it is common or rare. It has also been recognised that the receipts and expenditure method, when applied to very profitable undertakings, may result in a figure which is too high to be properly regarded as rent (see *Sandown Park Ltd v Esher Urban District Council and Castle (VO)* [1954] 25 DRA 320). In such cases the figure may require a downwards adjustment.

The competing valuation approaches to ascertain the tenant's share

Bay Farm

51. Mr Penfold used the valuation of the tenant's assets as his starting point (£4,406,400) to which he added 6 weeks' worth of working capital (£415,385) making a total Tenant's capital of £4,821,875. He then applied 10% to this figure to reflect the minimum rate of return a tenant would require from his investment which worked out at £482,187. This figure represented 77.52% of the divisible balance in the year to 31 March 2016; 77.89% of the divisible balance in the year to 31 March 2017 and 73.19% of the divisible balance in the year to 31 March 2018. This led him to believe that a tenant's share in the region of 72½ to 77½% would be considered reasonable by a hypothetical tenant to arrive at a figure representing an acceptable rate of return, given the risks involved. He therefore adopted 72½% for the tenant's share before arriving at a valuation of £170,000 Rateable Value with effect from 15 February 2018.

52. For the respondent, Mr Prescott had adopted a percentage of 49½% for the tenant's share. This figure was arrived at by increasing the proportion of the tenant's capital assets, within the hereditament of 45% by 10% to reflect risk.

53. His valuation of the Bay Farm facility was £285,000 RV with effect from 15 February 2018.

Oak Grove

54. Again, Mr Penfold's valuation approach was to use the tenant's capital investment in the plant as his starting point. He had calculated this to be £3,421,600 for the assets to which he added 6 weeks of working capital of £326,261 giving a total of £3,747,861. In his opinion, a tenant would have required a rate of return of 10% on his investment and therefore his calculation of the tenant's share is £374,786. The unfortunate consequence of Mr Penfold's calculation of the tenant's share based on a return on capital approach for Oak Grove was that his calculation of the tenant's share exceeded the divisible balance. However, in fairness to him, he did accept that his valuation of the Oak Grove facility had produced an unrealistic valuation.

55. As case law showed that a property generating a profit must have a value, Mr Penfold had used the fall-back position provided by the Memorandum of Agreement. His alternative proposed valuation, on which the Appellant's case in Oak Grove relied was £113,000 RV with effect from 1 April 2017 which equated to 4% of the Gross Receipts in Year One. This was the valuation collar, referred to in the Memorandum of Agreement (the accepted minimum value).

56. Mr Prescott had adopted a percentage of 44% for the tenant's share. This figure was arrived at by increasing the proportion of the tenant's capital assets, within the hereditament of 40% by 10% to reflect risk.

57. His valuation of the Oak Grove facility was £145,000 RV with effect from 1 April 2017.

58. In my experience and based upon the authorities I have read, if a valuation was undertaken by the full receipts and expenditure method, when it came to the divisible balance, the tenant's share being the first call on the divisible balance was normally derived from a split of the divisible balance. What percentage of the divisible balance was adopted for the tenant's share was very much a subjective decision made by the valuer or, on appeal by the tribunal, considering all relevant factors. This was the case with a seasonal farm attraction in *Fryer v Cox (VO)* [2022] UKUT 0229 (LC), the Upper Tribunal stated in paragraph 85 of its judgment;

> To a significant degree, this case comes down to a judgement about the percentage to be adopted for the tenant's share. According to the Rating Forum guidance the tenant's share must properly reflect the strengths and weaknesses of the hypothetical landlord and tenant, and it should look reasonable, having regard to the motives for occupation, compared with the amount of tenant's capital, the turnover and the divisible balance.

59. Instead of splitting the divisible balance, Mr Penfold applied a 10% return on the tenant's capital to calculate the tenant's share. This was a recognised and legitimate method of calculating the tenant's share. Again, in my experience, rating valuations can be arrived at by using a variety of methods. There is no law that compels the valuer what method of valuation should be used. Some textbooks may suggest that whichever method of valuation was employed, the answer that was arrived would be the same. However, that seldom was the case. Normally, whatever valuation method was employed, the valuer had to stand back and look and think for a minute and ask themselves, does the value that I have calculated look reasonable?

60. To be fair to Mr Penfold when it came to his valuation of Oak Grove that was what he did. In applying a return on the tenant's capital-based approach, his calculation of the tenant's share exceeded the divisible balance. Therefore, he had adopted the valuation collar of 4% of the receipts, as provided for in the Memorandum of Agreement. According to Mr Prescott, the valuation collar was normally applied, when initial calculations produced negative figures.

61. As Mr Penfold's return on the tenant's capital-based valuation approach did not produce a reasonable valuation for Oak Grove, I decided that it was not fit for purpose in valuing the appeal properties. The Valuation Officer's standard approach based on a split of a divisible balance was more tried and tested and, in my judgment, more appropriate for use in the appeal cases. In any event, when the valuation model was effectively agreed, including all the relevant inputs plus the starting point for the calculation of the tenant's share and all that

was effectively up for debate was the addition to reflect risk, I decided that it was inappropriate for me to tinker with something that was not broken. The Valuation Officer's valuation approach was therefore adopted, subject of course to the relevant upward adjustment of the tenant's share of the capital assets to reflect risk.

Tone of the list

62. In paragraph 41 of the Lands Tribunal's judgment in *O'Brien v Harwood (VO)* [2003] RA 244, the concept of tone of the list was described as follows:

> There are three stages leading to the establishment of tone of the list. At first, when a new rating list is put on deposit, entries will carry relatively little weight: they are opinions of value by the valuation officer, as yet unchallenged and untested by negotiation. Over time assessments will be challenged and agreed or determined by a valuation tribunal or this tribunal or accepted by lack of challenge. Finally, a stage is reached where enough assessments have been agreed or determined or are unchallenged to establish a pattern of values, a tone of the list.

63. In his expert report, Mr Prescott stated that since conventional valuation was adopted for power generators in the 2005 Rating List, a comprehensive tone had emerged in relation to both method of valuation to be adopted for baseload generators (R & E) and the method of arriving at the tenant's share (percentage of divisible balance based on tenant's assets plus a 10% risk addition). In the 2017 Rating List, this tone applied across every class of renewable generator and had been subject to widespread agreement or pre-agreement from agents specialising in the field of utilities generation and the operators of these sites.

64. Mr Prescott also informed me that approximately 2,160 hereditaments around 55% of the total, within what he described as renewable generation portfolio had been agreed in line with the Valuation Officer's approach (deriving the tenant's share from a split of the divisible balance with a 10% addition for risk. Moreover, having regard to the fact that the 2017 Rating List was now closed, any unchallenged assessments which could no longer be appealed brought the total close to 100%.

65. The type of hereditaments for which assessments were settled included intermittent generators like wind and solar farms up to much larger fuel-based power stations. Within these classes there were a number of types of generation new to the list including waste wood burners, tallow and rapeseed burners, gasification plants and virgin timber burners. All of these plants had faced varying degrees of problems related to the pioneering nature of the operations and in many cases the issues affecting larger biomass plants would have been greater than those for smaller farm-based AD plants, particularly so with gasification which continued to struggle to perform adequately. In all cases, however, the basis of valuation had been agreed at a share of the divisible balance with a standard 10% addition for risk.

66. On behalf of the respondent, Mr Ormondroyd argued that if a tone of the list was established it could overrule other evidence. In fairness, he did accept that tone values would not normally assist with R & E valuations because assessments arrived at by this method often did not follow a pattern of values, because there were normally so many variables with R & E based valuations, expenditure items and income received usually varied between enterprises within the same industry. However, this was not an issue in

these appeals or the renewable energy sector as a whole because of the series of agreed memoranda.

67. In order to see if there was a tone of the list, Mr Ormondroyd raised a number of questions for me to consider. Had a pattern of values been established? How many appeal/challenge settlements had been reached as opposed to the number under challenge? In answering his own questions, he said that it was very clear that there was an established tone. When looking at the renewable energy sector as a whole, there was a 99% level of agreement, albeit he conceded that with AD plants this was less so.

68. On behalf of the Appellants, Mr Kolinsky argued that the Valuation Officer's one size fits all approach for renewable energy hereditaments was inappropriate as AD plants were different to wind farms and solar farms because the inherent risks were greater with AD plants.

69. Mr Kolinsky also argued that the Valuation Officer's one size fits all approach did not meet the requirements of the Joint Professional Institutions' Rating Forum Guidance Note for The Receipts and Expenditure method of valuation in Non-Domestic Rating that was released in 1997. In paragraph 5.56 of the Guidance, it had this to say about the tenant's share.

> The tenant's share may be regarded as the first call on the divisible balance. This share has to be sufficient to induce the tenant to take the tenancy of the property and to provide a proper reward to achieve profit, an allowance for risk and a return on the tenant's capital. The amount of the deduction is a matter of judgement in the circumstances relating to the enterprise carried on at the property.

70. Mr Kolinsky contended that the respondent was wrong to suggest that a tone of the list had been established for AD plants. According to his analysis only between 8 and 12 settlements had been reached in line with the Valuation Officer's approach. There were 34 cases outstanding, including the appeals before me. Mr Kolinsky advocated that there could not be an established tone when there was an outstanding point to be settled. He put it to me that even if the inputs into the valuation model were in Mr Prescott's words "ratepayer friendly", it did not deal with how the divisible balance should be divided.

Risks

71. Ultimately, what these appeals boiled down to was relatively simple. I had to decide whether or not the Valuation Officer's standardised approach of adding 10% to the tenant's share of the assets properly reflected risk.

72. At the antecedent valuation date, 1 April 2015, Anaerobic Digestion was in its infancy as a new technology. This nascent technology was established in Europe, in countries like Austria and Germany, before it came to the United Kingdom. AD plants therefore post-dated earlier forms of renewable energy sources like solar farms and wind farms. Because of the nascent nature of AD technology, the appellants argued that there was a significant commissioning risk, which was relevant to the rating hypothesis, and other operational and regulatory risks which meant that operators faced a multitude a significant risk around the antecedent valuation date.

73. In giving their respective evidence for the Appellants, both Mr Bastow and Mr Kinnersely outlined the risks involved, which included the following;

a) Commissioning risks – including installation of all non-rateable items to enable the AD plant to function. Failure to commission a new AD site at a particular date may have a significant detrimental impact upon the tariff that the plant was capable of achieving for energy sales.
b) Operational risks – in the event of a business failure, the landlord would still retain the hereditament, but the tenant would be left with nothing. The wrong type of feedstock could result in downtime due to biology factors.
c) Technology risks. The majority of the AD providers were based in mainland Europe which meant there were logistical difficulties with regard to the supply and technical support during commissioning and operation. In addition, the technology was designed for continental feedstocks, often predominantly maize which could form part of a UK plant's diet, but not all of it. The UK climate was more maritime, in comparison with mainland Europe, which meant that technology issues sometimes arose resulting in downtime.
In addition, the technology required at an AD site included pumps, mixers, engines, gas membranes, computer control systems, alarm systems and even though each component may have been relatively simple the composite effect of all of the elements of an AD site result in a hugely complex process. An imbalance in one element can often manifest itself in seemingly unrelated issues for several weeks. For example, a blockage to a feed system which may be identified relatively quickly can affect digestate levels in the tanks, gas quality at the end of the process and reduced output.
d) Financial risks with sourcing, pricing, hauling and storing the feedstocks were significant. Factors such as the weather, competing crop prices and changes in legislation were largely out of the direct control of the AD plant operators, yet could have a significant impact on the annual cash flow. AD plants required large agricultural feedstocks which needed to be stored carefully to avoid crop losses in storage but also in compliance with the Environmental Agency's Storing Silage, Slurry and Fuel Oil regulations which specified the requirements for silage clamps and field clamps to avoid water course contamination. Investment was also required to enable sufficient storage to include buffering for poorer years or later harvests.
e) Digestate management risks. This was critical to a plant's operation. Even the separation out of the solid fraction left a substantial volume of liquid to dispose of to land with all of the regulatory restrictions that had to be adhered to. Digestate management had become over time a task for which specialist contractors had to be employed and their services often commanded premium fees. Non-compliance with the regulatory controls for spreading digestate could incur significant fines.
f) Process risks. In the early days of AD plants, there was a shortage of suitable labour in the UK with the required range of skillsets. Most operational staff were trained on the job and those who learned to operate the plants quickly were targeted by other AD operators.
Poor performance had led to substantial reductions in plant output and Efficiency compared to the forecast performance. Sometimes, poor process Performance can be resolved with additional capital investment, for instance the replacement or re-design of tank mixing systems or feeding mechanisms. Some performance issues may be remedied with additional staff or items of equipment being replaced quicker than was forecasted.

g) Regulatory risks. There was a requirement to use waste or crop residues in plants to meet the revised Renewal Heat Initiative requirements which added more risk both from the process management perspectives and the financial perspective. Whether food waste was incorporated into the process which required additional planning and infrastructure or farm manure and crop residues which often required amending processes and reliance on external supply chains were often increased.
h) Insurance risks. On or around the antecedent valuation date, there had been a number of AD plant failures which had resulted in an increasing about of insurance claims. Insurance policies had therefore become more difficult to obtain, as a number of insurance companies had exited the AD market. According to Mr Bastow, there were only 4 main insurance providers willing to provide cover and he had seen insurance policies double in cost in the last few years, which put some sites at risk of being uninsurable.

74. Both Mr Kinnersely and Mr Bastow, the latter in particular, accentuated the risks associated with operating AD plants. Having regard to Mr Bastow's witness report, I noted that he had been involved in the management, development and operation of a number of AD plants over the years and either, a company he was associated with, or he personally had acquired a number of, additional plants over the years.

75. With the above in mind, Mr Ormondroyd put it to Mr Bastow that his report had placed too much emphasis on the risks involved with AD plants as opposed to any analysis of the upsides. Moreover, Mr Ormondroyd made the point that some of the risks identified could not have possibly been foreseen at the antecedent valuation date.

76. In his evidence, Mr Prescott stated that the risks identified by the appellants had been mitigated by the respondent making reasonable assumptions which he referred to as being tenant friendly. In his expert report for the Oak Grove appeals, he said that the role of the valuer was not to "crystal ball gaze" but to make reasoned judgements about the forward costs and income streams relating to the production of power. In deriving a valuation model to reflect these income streams, he said it was fortunate that the lion's share of the income was largely calculable due to the fact it comprised index linked and "grandfathered" subsidies. Costs were more unpredictable, but the Valuation Officer did have the benefit of a wide range of data from forms of return which showed the trends in operating expenditure (opex) and fuel costs over a number of years. This information coupled with expert reports such as the Pyory energy market report and the NNFCC report on feedback costs, along with historical load factor data had been used to derive robust forward projections of opex and fuel costs which had been agreed in the memorandum of agreement.

77. Similarly in his expert report for the Bay Farm appeal, he said the appropriate allowance for operational risk ultimately came down to valuer judgement. A balance had to be struck between the landlord's and the tenant's shares. With this in mind, all valuation models for renewable energy generation hereditaments adopted a figure of 10% to reflect the tenant's risks. He accepted that it could be argued that baseload generators should have a greater allowance than intermittent ones to reflect the difference in operational risks. However, another way of looking at it, was that intermittent generators faced different risks due to the fact that they were totally reliant on the weather. Solar panels relied on the sun shining, wind farms relied on the wind blowing. The weather therefore could hamper intermittent energy providers from being able to quickly respond to the dynamics of the market and take advantage of peak demand, whereas an AD plant operating to baseload had no such

disadvantage. Intermittency therefore had an ongoing risk with income flows and ultimately when looking at the different types of providers, it was a question of balance.

78. Given the memorandum(s) of agreement(s), for the two different types of AD plant, the appellants argued that the Valuation Officer's standard addition of 10% to the tenant's share of the capital assets was insufficient and did not properly compensate the tenant, having regard to the nature of the risks involved. In contrast, the Valuation Officer's argument was, in essence, that the standard addition of 10% was fair because it had been applied across the board to different renewable energy hereditament types. In any event, the respondent's view was that the income figures they had fed into the respective forward valuation models were underscored and therefore ratepayer friendly.

79. The effective date and material date adopted by the Valuation Officer for power generators was post commissioning, at a stage where the plant has passed all acceptance tests and been handed over for operation. In his report, Mr Prescott maintained that financing costs and issues relating to construction and commissioning were not relevant to the rating valuation. Instead, it was argued, that what had to be addressed was the hypothetical ongoing operational risk assessments of a hypothetical landlord and the hypothetical tenant coming fresh to the scene and the relevant feed in tariff that was received was a factual issue.

80. As far as the Appellants were concerned commissioning was a serious risk which should be properly taken into account and reflected in the tenant's share. Mr Penfold did not agree with Mr Prescott's opinion that commissioning was irrelevant for rating purposes. His understanding was that the hereditament to be valued only comprised rateable items which were provided by the landlord. The assumption was that these rateable items were already complete before the commencement of the hypothetical tenancy. However, when it came to non-rateable items, there was no such assumption.

81. Mr Bastow had earlier confirmed that if an AD plant lacked the necessary non-rateable items, that were normally installed by the tenant, it would be impossible to commission the AD plant because it could not function. With this in mind, Mr Penfold considered that commissioning risks were matters for the hypothetical tenant.

82. Having listened intently to the competing arguments, it was clear that of all of the risks identified, commissioning was the number one risk as far as the Appellants were concerned. This was because if a new AD plant failed commissioning tests it would have serious implications on the tariff and therefore the income that the plant could generate for energy sales. Ultimately, if the tenant got the commissioning wrong, it could result in business failure.

83. Whilst I understood the appellants' argument, it appeared to me that this was where the real world and the hypothetical world, that was once referred to as cloud cuckoo land, collided. In the real world, the landlord would provide the tenant with the land, buildings and silage clamps etc and the latter would then install at its own expense the non-rateable assets which would allow the AD plant to function. However, in the hypothetical context of the rating world, the tenant would appear on the scene and make its rental bid on the basis that the landlord had a fully commissioned AD plant capable of immediate occupation and use. Looked at in that context and having regard, as I must, to factual matters as at the material date and on each respective material day, both AD plants were in operation. Therefore, the tenant's non-rateable items which were necessary for the AD plant to function had already been fully commissioned. Bay Farm was commissioned in early February 2018 and Oak

Grove was initially commissioned on 30 November 2013. With this in mind, in my judgment, no allowance for commissioning needed to be reflected in the tenant's share of the divisible balance. Consequently, the Valuation Officer's argument on this point was upheld.

84. Having regard to the other risks identified by the Appellants, given the nascent nature of the technology around the antecedent valuation date, I accepted that there was always an operational risk that could lead to business failure. However, that would apply to any business. The Appellants contended that, in the event of business failure that the tenants would be left with nothing, whilst the landlord on the other hand would still retain the hereditament. I was not convinced that, in the event of business failure, the tenant would be left with absolutely nothing. Granted the tenant would be forced to vacate the hereditament but, as was usually the case with any business failure, some of the tenant's possessions and chattels would have remained and provided they were salvageable could have been sold off to defray debts.

85. There were technological and process risks associated with AD plants, given that at the antecedent valuation date AD technology was new to the United Kingdom, having in effect imported, following trial and testing in mainland Europe where the climate was less maritime. However, as Mr Prescott pointed out combustion biomass and gasification plants had more complicated processes, in comparison with AD plants, and yet their assessments had been agreed in line with the valuation model and an overall risk addition of 10%.

86. Similarly regulatory risks were common with renewable energy producers and was to be expected. There were probably more regulatory risks with AD plants, in comparison to say solar and wind farms but, by the same taken, possibly less than biomass combustion and gasification plants.

87. I accepted that the risks involving digestate management and the difficulty in obtaining affordable policies had increased over time, but I had not seen sufficient evidence to convince me that these were elevated risks at the date I was looking to value the appeal properties.

88. As regards any financial risk, in my view, any risk in that aspect had already been more than mitigated against by the prior agreement of the projected income streams that had been incorporated into the valuation(s).

89. In Mr Bastow's expert report, he submitted that gas to grid AD plants, like Bay Farm, attracted greater risk than electricity to grid facilities. This was because in 2017, DEFRA required all new sites generating biomethane, such as Bay Farm, to obtain 50% of its gas from waste sources. If this was not achieved, then the subsidy was cut by 50%. This restriction had, as feared, resulted in additional costs in procuring and processing waste. My determination on this point was based on two observations. The first being, I must have regard to economic factors as at the antecedent valuation date of 1 April 2015. Secondly, the inputs for the gross income had already been agreed between the two parties. Therefore, I was not convinced that there was any risk differential between Bay Farm and Oak Farm. Having said that, whether or not the Valuation Officer's standard risk adjustment of 10% was right was another matter.

Conclusion on percentage uplift to reflect risk and decision

90. A general tone of the list had been established across the renewable energy sector where it had been accepted that the tenant's share was derived from using the tenant's share of the

capital assets (which were non-rateable) to which 10% was added to reflect risk. Having regard to the detailed settlement evidence, I noted that 10% to reflect risk had been agreed or accepted in the wind, solar and hydro energy sectors. I also observed that assessments for biomass power plants and other AD plants, albeit the number of settlements with regard to the latter were smaller in number. As Mr Kolinsky pointed out, the number of appeals outstanding for AD plants were greater in number, in comparison with those sites for which assessments were agreed.

91. Commonsense suggested to me that the risks associated with AD plants would have been greater than those which affected solar and wind hereditaments, because there was more that could go wrong, and the regulatory controls would have been greater. With this in mind, I was not convinced that the Valuation Officer's one size fits all approach worked because whilst I was valuing renewable energy hereditaments, I was valuing a particular class of renewable hereditament, in these appeals it was AD plants, which had their own risks some of which were not shared with others like digestate risks.

92. The respondent's position was that the inputs used in the valuation model were ratepayer friendly and therefore because they were to the tenant's benefit, the risks had been largely mitigated against. Mr Kolinsky argued that, even if this was so, it did not deal with how the divisible balance should be divided. In most R & E valuations I have witnessed, it was the actual income and expenditure figures which have been used to arrive at the divisible balance. In the appeal cases, speculative figures were used and if the inputs were tenant friendly, as appeared to be the case, this would mean that the tenant would already have received some reward for its occupation, before the resulting divisible balance was apportioned to reflect the respective tenant's and landlord's shares.

93. In his expert report, Mr Prescott referred to what he called a "stand back and look" approach where 10% had been applied across the board to reflect to risk and that this had been widely accepted. However, the Appellants claimed except within the AD industry

94. Also in Mr Prescott's evidence, he stated that the only energy generating type of hereditament where a higher risk allowance had been agreed were nuclear power stations, where a risk adjustment of 25% had been agreed. He said that this was justified because it reflected the exceptionally high risk that the tenant had to bear of non-statutory outages caused by reliability issues of a complex, highly regulated operation of an aging fleet of reactors. Given this information, I could not accept that the operation of AD plants was anywhere near as risky as running a nuclear power station.

95. I was not convinced that the standard addition of 10% to reflect risk was appropriate in these appeals. What the valuation model did not allow for was working capital. A tenant would require significant working capital to source feedstock from a short harvesting season with a 12 months' lead in time and also to store it safely. In cross examination, Mr Prescott conceded that he had not given working capital any consideration. The tenant's share would normally reflect the fact that the tenant would expect a return on its working capital. Whilst the capital spent on the non-rateable assets had been reflected, being the starting point for the tenant's share before the uplift for risk adjustment, the required return on working capital had been disregarded by the Valuation Officer. Given this oversight, the standard addition of 10% that the Valuation Officer had applied to reflect risk appeared insufficient. Bearing in mind, my earlier observation that AD plants were riskier ventures, in comparison to wind and solar industries, the addition for risk had to be in excess of 10% but the question for me to decide was where to draw the line. It was self-evident that AD plants were not as risky as nuclear energy plants, so the addition for risk had to be somewhere

between 10 and 25%. Ultimately, I had little evidence to go on to arrive at a precise figure. However, having considered at some length all of the competing arguments and evidence submitted before me, I determined that an addition of 15% to the tenant's share of the assets to be fair and reasonable.

96. This meant that the tenant's share in respect of Bay Farm was 51.75% and for Oak Grove it was 46%.

97. My interim decision was released to the parties on 12 May 2025. Following the release of the interim decision, I directed the parties to adjust the inputs into the agreed model valuation so as to reflect the changes set out within paragraph 96.

98. The parties promptly complied with my direction and both parties' respective experts were in agreement with the valuations that had resulted from my decision. In the case of Bay Farm, despite my decision that the tenant's share should be increased, because of the consequences of the valuation cap, it meant that the appeal in respect of Bay Farm had to be dismissed. With regard to Oak Grove, the valuation produced by the forward looking model meant that the assessment was reduced to £140,000 Rateable Value with effect from 1 April 2017. As a corollary, the appeal, relating to the challenge against the compiled list entry (CHG100890093) was allowed. The second appeal (CHG100890081) being superfluous to requirements was dismissed.

PRESIDENT

Date issued to parties: 28 May 2025

Right of further appeal

Any party who is aggrieved by the Tribunal's decision(s), and who appeared or was represented at the hearing, has the right of appeal to the Upper Tribunal (Lands Chamber). Any such appeal should be made within four weeks of the date of this Final decision notice.
