Neutral Citation Number: [2011] IEHC 469

THE HIGH COURT

2010 56 JR

BETWEEN

DUNNES STORES

APPLICANT

V.

THE REVENUE COMMISSIONERS, THE MINISTER FOR THE ENVIRONMENT, HERITAGE AND LOCAL GOVERNMENT, IRELAND AND THE ATTORNEY GERNERAL

RESPONDENTS

Judgment of Mr. Justice Hedigan delivered the 13th of December 2011.

1. The applicant is an unlimited company carrying on business as a retailer of food, textiles and home wares. Its address is 46-50 South George's Street, Dublin 2. The first named respondent is a body charged with the collection of taxes and duties and its address is Dublin Castle, Dublin 2. The second named respondent is a Minister of the Government and has his address at Custom House, Dublin 1. The third named respondent is the Irish State. The fourth named respondent is sued as legal representative of the first and second named respondents and has her address at Government Buildings, Upper Merrion Street, Dublin 2.

2. The applicant seeks the following relief's:-

(1) An order of *certiorari* quashing:

(i) the assessment made by the first respondent of the environmental levy due by the applicant under the Waste Management (Environmental Levy) (Plastic Bag) Regulations, 2001 in respect of the accounting period from 1st July 2004 to 30th June 2005 as notified by a Notice of Assessment dated 12th November 2009;

(ii) the assessment made by the first respondent of the environmental levy due by the applicant under the Waste Management (Environmental Levy) (Plastic Bag) Regulations, 2001 in respect of the accounting period from 1st July 2005 to 30th June, 2006 as notified by a Notice of Assessment dated 12th November 2009;

(iii) the assessment made by the first respondent of the environmental levy due by the applicant under the Waste Management (Environmental Levy) (Plastic Bag) Regulations, 2001 in respect of the accounting period from 1st July 2006 to 30th June, 2007 as notified by a Notice of Assessment dated 12th November 2009;

(iv) the assessment made by the first respondent of the environmental levy due by the applicant under the Waste Management (Environmental Levy) (Plastic Bag) Regulations, 2001 in respect of the accounting period from 1st July 2007 to 30th June, 2008 as notified by a Notice of Assessment dated 12th November 2009; (the "assessments")

(2) A declaration, by way of application for judicial review, that any levy which may lawfully be imposed pursuant to section 72 of the Waste Management Act 1996 (as inserted by section 9 of the Waste Management (Amendment) Act 2001) can apply only to plastic bags which are suitable for use by customers at the point of sale and which are supplied at the point of sale for the purposes of carrying ordinary groceries and household staples and does not apply to other forms of plastic bags provided by retailers for purposes of wrapping or hygiene.

(3) If necessary, a declaration, by way of an application for judicial review, that the Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001 are invalid and of no legal effect.

(4) If necessary, a declaration that section 72(5)(b) of the Waste Management Act 1996 (as inserted by section 9 of the Waste Management (Amendment) Act 2001) is contrary to the provisions of the Constitution.

(5) An order of prohibition restraining the First Respondent from making any further assessments of any levy due by the applicant under the Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001 in respect of any accounting period.

(6) An injunction, by way of an application for judicial review, restraining the first respondent from making any further assessments of any levy due by the applicant under the Waste Management (Environmental Levy) (Plastic Bag) Regulations, 2001 in respect of any accounting period.

(7) A declaration, by way of judicial review, that the first respondent has acted and/or is acting in breach of fair procedures and/or in breach of natural and constitutional justice and/or in breach of section 3 of the European Convention on Human Rights Act 2003 by failing and/or refusing to provide the Applicant with details of the basis for the Assessments.

(8) A stay on the taking of any steps by the first respondent on foot of the assessments.

(9) An injunction by way of an application for judicial review, restraining the first respondent from taking any steps on foot of the assessments.

(10) If necessary, an extension of time within which to bring these proceedings.

(11) Such further or other relief's as this Honourable Court may direct.

(12) The costs of and incidental to these proceedings.

Background facts

3.1 This case concerns the plastic bag levy. The current challenge is to the application of the levy to certain flimsy plastic bags supplied for hygiene purposes as opposed to grocery bags suitable for carrying groceries or other goods. The statutory basis for the plastic bag levy is contained in the Waste Management Act 1996 (the 1996"Act") and the Waste Management (Environmental levy) (Plastic Bag) Regulations 2001 (the "Regulations").

3.2 Section 7(1) of the 1996 Act provides that the second respondent may make regulations prescribing any matter or thing which is referred to in that Act as prescribed or to be prescribed or for the purpose of enabling any provision of the Act to have full effect. Section 29 of the Act deals with measures in relation to the recovery of waste and subsection (3) provides that the second respondent may make regulations in relation to or for the purpose of the recovery of waste as follows:-

> "(a) The Minster may, after consultation with any Minister of the Government concerned, make regulations in relation to or for the purpose of the recovery of waste or a specified class or classes of waste, and any such class may be defined by reference to the manufacturing or industrial process or other activity giving rise to the waste concerned or to such other matters as the Minister thinks appropriate.
>
> (b) Regulations under this section may include provisions for the imposition of producer responsibility obligations on producers of products.

Subsection (4) goes on to provide that, without prejudice to the generality of subsection (3), regulations under the section may provide for all or any of the matters specified which include under subparagraph (j):-

> "requiring the owner or manager of a supermarket, service station or other sales outlet to impose a charge on a customer in respect of the provision by him or her to the customer of any bag, container or other such packaging in relation to products or substances purchased by the customer at that sales outlet, such charge being of an amount equal to the full cost of such packaging or to such other amount as may be specified in the regulations."

3.3 Section 72 of the Waste Management Act 1996 (as inserted by section 9 of the Waste Management (Amendment) Act 2001), provides for the imposition of an environmental levy in respect of plastic bags with subsection (2) conferring on the second respondent a power to make regulations for that purpose as follows:-

> "The Minster may, with the consent of the Government, make regulations providing that there shall be chargeable, leviable and payable a levy (which shall be known as an 'environmental levy' and is in this section referred to as the 'levy') in respect of the supply to customers, at the point of sale to them of the goods or products to be placed in the bags, or otherwise of plastic bags in or at a specified class or classes of supermarket, service station or other sales outlet."

3.4 The Waste Management (Environmental levy) (Plastic Bag) Regulations 2001, were made by the second respondent on the 19th December 2001. They recite that they were made by the second respondent, with the consent of the Government, in exercise of the powers conferred on him by sections 7, 29 and 72 of the Act. The regulations require retailers to charge customers an amount equivalent to the levy set by those regulations in respect of the supply to them of plastic bags. Regulation 3 (1) provides that:-

> "On and from the 4th day of March 2002 there shall be charged, levied and paid a levy (which shall be known as an 'environmental levy' and is in these Regulations referred to as 'the levy') in respect of the supply to customers, at the point of sale to them of goods or products to be placed in the bags, or otherwise of plastic bags in or at any shop, supermarket, service station or other sales outlet."

The levy was set under Regulation 4 at 15 cents but was increased under the Waste Management (Environmental levy) (Plastic Bag) (Amendment) (No.2) Regulations 2007 to 22 cents with effect from 1st July 2007. In order for a bag to constitute a "plastic bag" within the meaning of section 72 of the 1996 Act, it must satisfy three criteria; firstly, it must be made wholly or in part of plastic, secondly, the bag must be suitable for use by a customer at the point of sale in a supermarket, service station or other sales outlet, and thirdly, it must not fall within the class of bag specified in the Regulations as being a class of bag excepted from the definition of a plastic bag. Article 5 of the 2001 Regulations specifies five classes of bags, which are excepted from the definition of "plastic bag" for the purpose of imposing the levy. Three of those classes impose particular conditions and the following size criteria; the bags must be:-

> "Not greater in dimension than 225mm in width (exclusive of any gussets), by 245 mm in depth (inclusive of any gussets), by 450mm in length; (inclusive of any handles)".

If the bags do not fulfil any of the specified dimensions, they are not excepted from the definition of "plastic bags" and, insofar as they satisfy the other two statutory criteria noted above, they constitute "plastic bags" within the meaning of section 72 of the Act.

3.5 By letter dated 1st January 2007, the applicant was informed that an audit of the Environmental Levy (Plastic Bag) activities of the applicant would commence on 22nd February, 2007. The applicant was notified that:-

> "The audit will also focus on 'excepted bags' as outlined in Article 5 of the Waste Management (Environmental Levy) (Plastic Bag) Regulations, 2001."

Joseph McDonnell of the Revenue Commissioners visited three retail stores of the applicant in March and April 2007. By e-mail dated 5th July 2007, Pascal Brennan, a partner in Deloitte & Touche, requested a meeting on behalf of the applicant with Austin Carroll (office of the Revenue Commissioners) in order to advance matters regarding the measurements of plastic bags intended to be excepted under the legislation. By letter dated 1st August, 2007, Pascal Brennan called Joseph McDonnell and requested the Revenue Commissioners to "immediately desist from taking further actions in the audit until it has been confirmed that the audit is being carried out in accordance with a proper interpretation of the Regulations." In a replying letter dated 9th August 2007, Mr McDonnell stated as follows:-

> "I must point out to you that the final arbitrators of Revenue legislation are of course the Appeal Commissioners and/or the Courts. I am sure you are aware of your rights where you disagree with Revenue's approach and/or interpretation."

Under cover of an email on 4th September 2007, Pascal Brennan furnished a submission concerning legislative interpretation of regulations concerning the plastic bag levy. By letter dated 5th October 2007, Sean O'Suilleabhain of the Revenue Commissioners responded to the submission made by Pascal Brennan.

3.6 Under cover of letters dated 27th June 2008, the Revenue Commissioners served a Notice of Assessment on the applicant in respect of the period from 1st July 2004 to 30th June 2005 inclusive. By letter dated 14th July 2008 the applicant indicated that it wished to appeal against the assessment on the grounds that it was excessive and that there was no liability due. By letter dated 24th July 2008, Brendan Crawford of the Revenue Commissioners indicated that he wished to progress the appeal and requested Mr Sheridan of the applicant to indicate if the appeal would be an "argument" appeal or a "quantum" appeal. In a replying letter dated 30th July 2008, Mr Sheridan stated that he was "not in a position to answer these questions until [he had] full details of the basis for the assessments." Mr Sheridan requested full details of "(a) how the inspector arrived at the assessment; (b) on what basis he has concluded that the levy due is €12,869,048; (c) details of the relevant calculations; and (d) the evidential basis on which such calculations are based and have been arrived at." In a replying letter dated 8th August 2008, Mr Crawford noted that there was no provision in the relevant legislation/regulations that required a Notice of Assessment to set out any details or particulars other than the amount of tax to be paid by a chargeable person. Mr Crawford also stated to the applicants that "the assessment relates to your liability in relation to the environmental levy. All material relevant to that levy is within your power of procurement and control."

3.7 Further notices of Assessment relating to the periods from 1st July 2006 – 30th June 2007 and 1st July 2007 – 30th July 2008 were served on the applicant. By letter dated the 30th July, 2008 the applicant informed the Revenue Commissioners that it wished to appeal against those assessments on grounds that they were "excessive and there is no liability due". Following discussions with the applicant, Joseph McDonnell of the Revenue Commissioners informed the applicant by letter dated 19th September 2008, that the said Notices of Assessment were vacated. In replying correspondence of the same date, Larry Howard confirmed on behalf of the applicant that, if the Revenue Commissioners raised any new assessments on or before 10th October 2008, the applicant would not raise any time limit issues. Following a meeting with Margaret Heffernan on 29th September 2008, Mr Crawford served Notices of Assessment on Ms Heffernan under cover of correspondence dated 19th October, 2008. Mr Crawford confirmed that the assessments were in respect of additional liabilities identified during the recent audit. By letter dated 17th October 2008, Joseph McDonnell vacated the Notices of Assessment. On 3rd November 2009, Joseph McDonnell attended a meeting with representatives of the applicant (Larry Howard and Noel Fox) and furnished information and documentation to those representatives regarding the basis for the assessments. Further documentation in that regard was faxed to the applicant on 4th November 2009. On the 12th November 2009, the respondent notified the applicant's company secretary of an assessment made of a levy due by the applicant under the regulations in respect of the accounting periods from 1st July 2004 to 30th June 2005, from 1st July 2005 to 30th June 2006, from 1st July 2006 to 30th June 2007 and from 1st July 2007 to 30th June 2008 ("the assessments"). The total sum claimed by the first respondent under the assessments is €36,573,727.

3.8 By letter dated 19th November 2009, the company secretary of the applicant informed the Revenue Commissioners and the office of the Appeal Commissioners that the applicant wished to appeal against the assessments "on the grounds that it is estimated, excessive and that there is no liability due." By letter dated the 2nd December 2009, Mr Crawford indicated that he wished to progress the appeal and that he proposed writing to the clerk of the Appeal Commissioners requesting the appointment of a time for the hearing of the appeal. Before doing so he requested Mr Sheridan to indicate whether the appeal would be an "argument" appeal or a "quantum" appeal. In a letter dated 14th December 2009, Mr Sheridan asserted that the applicant would not be in a position to answer these questions until it had full details of the basis for the assessments and requested the details set out in his letter. In a letter dated 22nd December 2009, Mr Crawford stated that the purpose of his letter was to assist the Appeal Commissioners, he also noted that there was no provision in the relevant legislation which required a notice of assessment to set out any details other than the amount of tax to be paid by a chargeable person. He confirmed that the notice of assessment was based on his best judgment following on from an audit carried out at the premises of the applicant. Mr Crawford also stated as follows:-

> "The assessments relate to your liability in relation to the environment levy. All material relevant to that levy is within your power of procurement and control."

3.9 The applicant submits that these assessments amount to an unlawful attempt to apply the levy to flimsy plastic bags supplied for the purpose of wrapping goods and supplied otherwise than at the point of sale. The applicant submits that this is unlawful and *ultra vires*. The applicant further submits that the manner in which the first and second respondents have gone about seeking to assess the applicant for a very substantial sum in respect of this levy infringes its right to fair procedures. In these proceedings the applicant seeks *inter alia* an order quashing these assessments, an order of prohibition restraining the respondent from making further assessments of any levy due under the Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001, if necessary a declaration that the 2001 Regulations are of no legal effect, and if necessary a declaration that section 72 (5) (b) of the Waste Management Act 1996 is contrary to the Constitution.

Applicant's submissions

4.1 The applicant submits that what is at issue here is an unlawful attempt by the first and second respondents to extend the plastic bag levy to bags to which it was never intended to apply and thereby unlawfully collect revenue from the applicant. They have sought to do this while at the same time refusing, in breach of fair procedures, to provide the applicant with the necessary information as to how it calculates the money allegedly due.

4.2 The applicant submits that given that the contents of the 2001 Regulations closely mirror the language used in section 72 of the Act and given the fact that the regulations deal with the imposition of an environmental levy for the purpose of preventing waste rather that recovering waste, it is submitted that the real statutory basis for the regulations is section 72 of the Act. The applicant notes in this regard that, under section 4 of the Act, waste is defined as meaning any substance or object belonging to a category of waste specified in the First Schedule of the Act or for the time being included in the European Waste Catalogue which the holder discards or intends or is required to discard. The applicant argues that a plastic bag provided to a customer of a retail outlet does not constitute waste and does not become waste until such time as the holder of the plastic bag discards it or forms an intention to discard it.

4.3 Section 72 imposes the plastic bag levy and the applicant submits that the words used in s.72 are not clear and unambiguous. The provision is open to a number of interpretations none of which favour the respondents' argument that the levy applies to flimsy plastic bags. Thus the assessment that the applicant owes the first respondent €36,573,727 must fail. When dealing with statutory interpretation the guiding principle is that words should be given their ordinary and plain meaning. As Denham J. (as she then was) stated in *B (D) v Minister for Health and Children* [2003] 3 I.R.12 at 18:-

> "In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blaney J in *Howard v The Commissioner of Public Works* [1994] I IR 101. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the Acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words are plain and unambiguous they declare best the intention of the legislature. If the meaning of a statute is not plain then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. In that case I held also that statutes should be construed according to the intention expressed in the legislation and that the words used in the statute best declare the intent of the Act. I took a similar approach in *M'OC v Minister for Health* [2002] 1 I.R. 234 holding that it was well established that in construing statutes, effect should be given to clear and unambiguous words, for the words of the statute best declare the purpose of the Act."

It is well established that the principles of statutory interpretation applicable to the interpretation of primary legislation are equally applicable to the interpretation of secondary legislation such as the 2001 Regulations.

4.4 It is also a well established principle of statutory interpretation that a legislative provision imposing or authorising the imposition of any form of penal or taxation liability must be strictly construed. This principle was clearly stated by Henchy J in *Inspector of Taxes v Kiernan* [1981] I.R. 117

> "If a word or expression is used in a statute creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be strictly construed so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique and slack language."

The presumption against doubtful penalisation was also addressed in *Dunnes Stores v Director of Consumer Affairs* [2006] 1 IR 355 where an issue arose as to whether disposable nappies constituted "household necessaries" such that they fell within the scope of the Restrictive Practices (Groceries) Order 1987 and so were subject to the ban on below cost selling, it was an offence to act in contravention of a provision of a grocery order. Finlay Geoghegan J held:-

> "Accordingly it appears that the court must construe the phrase 'household necessaries…ordinarily sold in grocery shops' strictly and in seeking to determine whether or not that phrase when construed in accordance with the above principles includes disposable nappies (the court) would have to be satisfied that it has a meaning which demonstrated by clear and unambiguous language that it includes disposable nappies."

The applicant submits that the words used in s.72 are not clear and unambiguous. It is not clear whether the levy only applies to the supply to customers of plastic bags at the point of sale. The extension of the levy to flimsy bags amounts to the imposition of a fresh liability by the use of oblique and slack language. Not only do the Regulations provide for the imposition of a taxation liability in the form of a levy, section 72(9) of the Act provides that a person who fails to pay a levy that is due and payable by virtue of regulations made under subsection (2) is guilty of an offence. Accordingly, there can be no doubt but that the presumption against doubtful penalisation applies. The Interpretation Act 2005 contains an exception in respect of "the imposition of a penal or other sanction", the principle of strict construction of penal and taxation provisions is therefore unaffected by that Act.

4.5 Regulation 3(1) of the Regulations provides for the imposition of the levy:

> "in respect of the supply to customers, at the point of sale to them of goods or products to be placed in the bag, or otherwise of plastic bags in or at any shop, supermarket, service station or other sales outlet."

This wording follows closely the enabling wording in section 72(2) of the Act. The regulations do not contain a definition of "plastic bag". Accordingly, applying section 19 of the Interpretation Act 2005, the term "plastic bag" has the same meaning in the regulation as in section 72(1) of the Act which defines it as meaning a bag:-

> "(a) made wholly or partly of plastic,
>
> (b) which is suitable for use by a customer at the point of sale,
>
> (c) other than a bag which falls within a class of bag specified in regulations under subsection (2) as being a class of bag exempted from this definition."

Taking this definition and regulation 3(1) together, it is submitted that a plastic bag will only fall within the scope of the Regulations if it is supplied to a customer at the point of sale and it is suitable for use by a customer at the point of sale. The applicant submits that it is clear from the grammatical construction of the sentence, especially the use of commas on either side of the expression "at the point of sale to them of goods or products to be placed in the bags" that the words "or otherwise" are not referable to and do not qualify this requirement. On the contrary, the words "or otherwise" are referable to the expression "in respect of the supply to customers" and cover the situation where the plastic bags are supplied to a customer for a purpose other than that of placing goods purchased in the premises therein, e.g. if a customer wanted a number of extra bags for a purpose other than carrying the goods purchased. If there is any doubt about this, then applying the principle of strict construction, it must be resolved in favour of the applicant. Applying the test in *Kiernan* above it cannot be said that regulation 3(1) provides by 'clear and unambiguous language' that it covers the supply of plastic bags otherwise than at the point of sale.

4.6 In paragraph 33 of his replying affidavit, Mr Ronan Mulhall contends that the construction contended for by the applicant would be absurd because it would mean that retailers could leave bags at locations other than the point of sale which would not be subject to the levy. He, thus, contends that there is no requirement that plastic bags be provided at the point of sale for the levy to apply. There are however a number of difficulties with this contention. Firstly, Mr Mulhall has failed to adduce any evidence that here has been any attempt by retailers to circumvent the levy by providing plastic bags in retail outlets other than at the point of sale. Indeed, it would seem most unlikely that this would occur given that bags are only required or sought by a customer at the point when he or she is actually at the checkout. Secondly, the interpretation advanced by Mr Mulhall involves reading out of the regulation 3(1), the wording "at the point of sale to them of goods or products to be placed in the bags, or otherwise" so that the regulation simply reads "in respect of the supply to customers of plastic bags in or at any shop, supermarket, service station or retail outlet". Regardless of whether it is considered that such an interpretation would better achieve the objectives of the levy, it is simply not permissible to excise wording from a statutory provision in this fashion and effect must be given to all of the words used which cannot be treated as surplusage unless no other conclusion is possible. This is clear from the case *Cork County Council v Whillock* [1993] 1 IR 231 where Egan J held at 239:-

> "There is abundant authority for the presumption that words are not used in a statute without meaning and are not tautologous or superfluous, and so effect must be given, if possible, to all the words used, for the legislature must be deemed not to waste its words or say anything in vain."

Even if the interpretation put forward by the applicant was regarded as leading to an absurd result and the applicant submits that there is no basis for so concluding, it is one that is dictated by a literal interpretation of the Regulations and reinforced by the principle of strict construction. In *DPP v Corcoran* [1995] 2 IR 259 where an issue arose in relation to the interpretation of section 13 of the Road Traffic Act 1978, Lavan J. held that, although the literal interpretation of the provision might seem undesirable or even absurd, he was not entitled to go beyond the plain meaning of the subsection at issue.

4.7 The second requirement is that the plastic bag must be "suitable for use by a customer at the point of sale" in a retail outlet. Given that this criterion of suitability for use at the point of sale applies across a range of retail outlets, i.e. supermarkets, service stations and other sales outlets, it is submitted that the plastic bags in question must have sufficient capacity, strength and durability and must be suitable for carrying a range of goods and items, and not just a single item. The flimsy bags at issue do not fulfil the functional requirement in terms of capacity, strength and durability to be used by customers at the point of sale to pack and carry away items purchased by them due to their thinness, the type of plastic used and the absence of handles on the vast majority of them. Thus, they fail to satisfy the test of being suitable for use at the point of sale and, again, regulation 3(1) does not provide by "clear and unambiguous language" that such bags fall within its scope. In his replying affidavit Mr. Mulhall takes issue with the proposition that the flimsy bags are not suitable for use at the point of sale. He refers to the small bags supplied by music stores that hold a CD and argues that a plastic bag does not have to be any particular size. However, if the argument of Mr. Mulhall is taken to its logical conclusion and there are no functional requirements or other size criteria of suitability for use at the point of sale that have to be satisfied by a plastic bag, then the effect is to denude the words "suitable for use by a customer at the point of sale" and to render these words superfluous, this is impermissible as words must be given a meaning. It is worth noting that the interpretation of regulation 3(1) put forward by Mr Mulhall is not consistent with the materials exhibited by him in his first affidavit. He explains in paragraphs 2 to 3 of his affidavit that the introduction of an environmental levy on plastic bags owes its genesis to a consultancy study commissioned by the second respondent, which recommended such a levy. It is immediately apparent from the executive summary of that study that the problem with which it was concerned was the "use of disposable plastic shopping bags" and the study is replete with references to "shopping bags" and "carrier bags". When considering various options to deal with littering problems caused by the plastic shopping bags, the consultants consider the option of a levy on the point of sale. One of the advantages identified of a levy at the point of sale is that "customers would have a choice in whether to use a bag at all, use a re-usable bag that they have brought to the store or if offered by the store (use) a paper bag". It is immediately apparent from a consideration of these options that the consultants are addressing the use of and alternatives to the use of, plastic carrier bags at the point of sale, not flimsy bags used to wrap meat, fish and vegetables. It is submitted that the evidence adduced on behalf of the respondents is actually strongly supportive of the position of the applicant that the proper interpretation of regulation 3(1) is that the levy only applies to plastic bags supplied at the point of sale which are carrier type bags and, thus, suitable for use at the point of sale.

4.8 Section 72(2) provides statutory authority for the making of regulations for an environmental levy in respect of plastic bags supplied "in or at a specified class or classes of supermarket, service station or other sales outlet". That subsection thus clearly envisaged and required the second respondent in any regulations made by him to specify a class or classes of retail outlet to which the levy would apply. However, instead of doing this, the regulations apply the levy to all retail outlets without discrimination. Accordingly, it is submitted that the regulations are *ultra vires* the second respondent.

4.9 The applicant further submits that the regulations are unconstitutional insofar as they purport to adapt and amend the provisions of primary legislation relating to the estimation, collection and recovery of taxes including the Taxes Consolidation Act 1997 so as to facilitate the estimation, collection and recovery of the levy. Section 75(5)(b) of the Act provides that regulations made by the Minister pursuant to subsection (2) shall provide for the following matters:-

> (a) the specification of the person or persons to whom the levy shall be payable (referred to in this section as a 'collection authority')
>
> (b) the conferral of powers on a collection authority with respect to the collection and recovery of the levy (and, for this purpose, the regulations may adapt, with or without modifications, the provisions of any enactment relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment).

Such provision is made in regulation 15 which provides in part as follows:

> "(1) Without prejudice to any other mode of recovery, the provisions of any enactment relating to the recovery of income tax and the provisions of any rule of court so relating shall apply to the recovery of any levy payable as they apply in relation to the recovery of income tax.
>
> (2) In particular and without prejudice to the generality of sub-article (1), that sub-article applies the provisions of section 961, 963, 964(1) 966 and 1002 of the Taxes Consolidation Act, 1997."

The applicant submits that section 72(5)(b) of the Act is unconstitutional in that it purports to authorise the second respondent to adapt, with or without modifications, the provisions of an enactment in relation to the estimation, collection and recovery of taxes. Under Article 15.2 of the constitution, the sole and exclusive power to make laws for the State is vested in the Oireachtas and the second respondent does not have power to amend primary legislation and it is well established that the Oireachtas may not delegate the power, to make, repeal or amend legislation. As such, section 72 (5)(b) constitutes an impermissible delegation of the legislative power of the Oireachtas.

4.10 If the Court finds that section 72(5)(b) does authorise the making of regulations which have the effect of amending primary legislation, the applicant submits that the subsection does not contain sufficient principles and policies in relation to how the legislation relating to the estimation, collection and recovery of tax is to be adapted and extended to the collection of the levy and therefore fails the test established by the Supreme Court in *Cityview Press Ltd v An Chomhairle Oiliuna* [1980] IR 381 where O'Higgins CJ held that:-

> "In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within permitted limits –if the law is laid down in the

> statute and details are only filled in or completed by the designated Minister or subordinate body- there is no unauthorised delegation of legislative power."

Section 72(5) (b) fails the principles and policies test by purporting to confer on the Minister a wide ranging power to make regulations adapting, with or without modifications, the provisions of any enactment relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment without providing for any limitation or guidance as to what modifications are permissible. The respondents have pleaded, in their statement of opposition, that section 72(5) (b) is necessitated by the obligations of membership of the European Union. That there is no substance at all to this contention is underlined by the failure of the respondents to identify any obligation imposed on the state by European Law

4.11 The respondents have advanced the contention that, if part of section 72(5) (b) is found to be unconstitutional on the ground that it proposes to authorise the second respondent by regulations to adapt, without modifications, the provisions of any enactment in relation to the estimation, collection and/or recovery of taxes, the courts should sever that portion of the subsection and should not find the entirety of the subsection to be unconstitutional. In particular, it is contended that the subsection is not invalid insofar as it otherwise provides for the conferral of powers on a collection authority with respect to the collection and recovery of the levy. The principles to be applied in relation to severance of a statutory provision, part of which is found to be unconstitutional, were laid down by the Supreme Court in *Maher v Attorney General* [1973] IR 140. In that case, the Court held that s. 44(2)(a) of the Road Traffic Act 1968 was unconstitutional on the ground that, by making a certificate of blood alcohol content 'conclusive evidence' as to the matter certified, the judicial function was pre-empted and infringed. The Court rejected the contention that it should simply sever the offending word "conclusive" from the subsection and find the balance to be constitutional. Fitzgerald CJ stated:

> "Article 15, s.4, sub-s. 2, of the Constitution lays down that every law enacted by the Oireachtas which is in any respect repugnant to the Constitution or to any provision thereof shall, but to the extent only of such repugnancy, be invalid; therefore there is a presumption that a statute or a statutory provision is not intended to be constitutionally operative only as an entirety. This presumption, however, may be rebutted if it can be shown that, after a part has been held unconstitutional, the remainder may be held to stand independently and legally operable as representing the will of the legislature. But if what remains is so inextricably bound up with the part held invalid that the remainder cannot survive independently, or if the remainder would not represent the legislative intent, the remaining part will not be severed and given constitutional validity."

It is submitted that in applying this authority, the Court should not make any attempt to sever section 72(5) (b) because it is central to the legislative scheme of the section. Subsection (2) provides that the Minister "may" make regulations and subsection (6) specifies matters which those regulations "may" provide for. However, by way of contrast to that permissive language, subsection (5) stipulates that regulations made under subsection (2) "shall" provide for the matters specified therein including under subparagraph (b). The mandatory requirement to include such matters in the regulations makes it clear that the Oireachtas did not contemplate any circumstances where those powers would not be conferred by the regulations. Furthermore, those powers are entirely interconnected, dealing with estimation, collection and recovery of the levy and ancillary matters, and were not meant to be divisible. Accordingly, it is submitted that there is no basis on which the Court could attempt to excise the unconstitutional portions of subsection (5) (b). It is also important to make clear that, if the Court finds that section 72(5) (b) or any part of it is unconstitutional, it necessarily follows that the Regulations will be invalid because they were made in the exercise of powers that were not lawfully conferred on the second respondent and include regulations that impermissibly adapt and amend the provisions of the Taxes Consolidation Act 1997.

4.12 The applicant further submits that the respondent acted in breach of fair procedures by refusing to provide the applicant with the necessary information as to how it calculates the money allegedly due. Regulation 13(1) of the Regulations makes provision for the raising of assessments in cases of suspected underpayment of the plastic bag levy. The assessments dated 12th November, 2009 provide virtually no information in relation to the balance of levy claimed to be owed by the applicant, simply setting out the figures for the estimated total amount of levy, the amount paid and the balance claimed to be owed in respect of each accounting period. By letter dated the 14th December, 2009 the applicant requested details of the basis for each assessment including details of the relevant calculations and clarification as to the types and categories of bags included in the calculations. The first respondent refused to provide this information on the basis that there is no provision in Regulation 16 of the Regulations or section 954(5) of the Taxes Consolidation Act 1997 whereby a notice of assessment has to set out details other than the amount of tax owed. The only information provided was that the assessments had been raised following an audit carried out on the applicant's premises and were based on the "best judgment" of the relevant tax official. The total sum claimed by the first respondent is €36,573,727. In order to have an effective right of appeal, the applicant requires to be provided with sufficient information to understand the basis on which it is alleged that the applicant is liable to pay that sum. A fundamental requirement of fair procedures is that a person affected by a decision is given notice and an opportunity to make representations prior to the making of the decision or, if the decision is made, be armed with information relevant to the decision so as to be able to appeal against it. The duty to observe fair procedures and the importance of providing information to a taxpayer who appeals against an assessment is underlined by the decision of the Supreme Court in *Keogh v Criminal Assets Bureau* [2004] 2 IR 159 where Keane CJ stated at 174:-

> "It is beyond argument that the second respondents and their agents, as public authorities, are bound to observe fair procedures in the exercise of the powers conferred on them by the tax code, and where an actionable breach of those requirements has been established, that does not mean that the statute has been in any way amended as a result of a decision to that effect by a court. That view would be impossible to reconcile, in my judgment, with the obligation of the courts to ensure that public authorities perform the functions entrusted to them by statute in accordance with the Constitution and the law."

If a taxpayer has an entitlement to be informed of the procedures required to be complied with in order to bring an appeal, it is submitted that it must follow that he is entitled to an effective appeal and to be provided with sufficient information to enable him or her to exercise that right of appeal. By reason of the refusal of the first respondent to provide this information, the applicant is prejudiced in its ability to call evidence, to cross-examine any revenue official, to make submissions and otherwise advance its appeals against the assessments.

Respondents' Submissions

5.1 The respondents submit that the bags the subject matter of these proceedings are plastic bags which exceed one or more of the dimensions prescribed by Article 5 which specifies the classes of bags which are excepted from the definition of "plastic bag". Accordingly they constitute plastic bags within the meaning of section 72 of the 1996 Act. Moreover, there is no substance to the contention of the applicant that the regulations fail to specify the class or classes of supermarket, service station or other sales outlet wherein the levy is chargeable. Article 3(1) of the 2001 Regulation specifies that , from 4th March, 2002 there shall be charged

a levy in respect of the supply to customers, at the point of sale to them of goods or products to be placed in bags, or otherwise of plastic bags in or at "any shop, supermarket, service station or other sales outlet". Therefore, the specified class or classes of supermarket, service station or other sales outlet for the purpose of section 72(2) are "any shop, supermarket, service station or other sales outlet".

5.2 The second ground of challenge to the 2001 regulations- that they are not regulations in relation to the recovery of waste within the meaning of the provisions of the 1996 Act is also misconceived. This ground rests on the erroneous assumption that the 2001 Regulations were made exclusively pursuant to section 29(3) of the 1996 Act and that it provides the only legislative basis for the regulations. The 2001 regulations expressly record that they were made by the Minister in exercise of the powers conferred on him by section 7 of the 1996 Act, section 29 of the 1996 Act and section 72 of the 1996 Act. Thus, quite apart from the provisions of section 29 of the 1996 Act, section 7 and section 72 of the 1996 Act clearly provide a legislative basis for the making of regulations. While section 29 confers power to make regulations "in relation to or for the purpose of the recovery of waste or a specified class or classes of waste", it also provides that "any such class may be defined by reference to the manufacturing or industrial process or other activity giving rise to the waste concerned or to such other matters as the Minister thinks appropriate." Thus it is clearly irrelevant whether the plastic bags the subject of the levy constitute "waste" within the meaning of that term in the 1996 Act and/ or whether they only become "waste" when the holder of a plastic bag discards it or forms an intention to discard it.

5.3 The third ground of challenge - that the 2001 Regulations apply only to certain specified plastic bags and are not regulations requiring the owner of a supermarket, service station or other sales outlet to impose a charge on a customer in respect of the provision by him or her to the customer of any bag, container or other such packaging in relation to products or substances purchased by the customer at the sales outlet – is misplaced because the power to make regulations is in respect of "any bag, container or other such packaging" this power plainly includes the lesser power to make regulations (such as the 2001 regulations) regarding specified plastic bags. The fourth ground of challenge is that the general power conferred by section 7 of the 1996 Act is subject to the more specific powers granted by sections 29 and 72 of the 1996 Act. If the Oireachtas intended the power conferred by section 7 of the 1996 Act to be subject to the powers conferred by sections 29 and or section 72 of that Act, it could and would have expressly stated so.

5.4 The fifth ground of challenge is that the definition of a "plastic bag" in the 2001 regulations is so uncertain that the regulations are *ultra vires* the second respondent and/or invalid. The term "plastic bag" is defined in section 72(1) of the 1996 Act. The third limb of this definition is that the bag must not fall within a class of bag specified in the regulations made under section 72(2) as being a class of bag excepted from the said definition of "plastic bag". Sub paragraphs (a) – (e) of Article 5 specify in clear and precise terms the bags which are excepted from the definition of a "plastic bag". There is, therefore, no basis for the contention that any of those provisions are uncertain, still less that they are so uncertain as to render the regulations invalid.

5.5 The first relief sought by the applicant is an order quashing certain assessments made by the Revenue Commissioners. The assessments are challenged on the grounds that they were *ultra vires* the first respondent or were made without and/ or in excess of jurisdiction in circumstances where:-

> (i) It is alleged they were made by the first respondent on the basis of an error of law in the interpretation and application of the 2001 regulations.
>
> (ii) It is alleged the 2001 regulations pursuant to which the assessments were made are invalid and/or section 72(5)(b) of the 1996 Act, as inserted by section 9 of the 2001 Act is unconstitutional.

The first of the aforesaid grounds intersects with the grounds underlying the second relief claimed –a Declaration that the levy provided for in the 2001 regulations can only lawfully be imposed on plastic bags which are supplied at the point of sale and which are suitable for use by customers at the point of sale for the purposes of carrying household groceries and does not apply to other forms of plastic bags provided by retailers for the purposes of wrapping certain products such as fish or meat for the purposes of hygiene. The first issue which arises is the proper interpretation of the relevant provisions of the 2001 regulations and whether the first respondent erred in law in its interpretation and application of the 2001 regulations. A plastic bag is defined in section 72(1) of the 1996 Act as – a bag made wholly or in part of plastic, which is suitable for use by a customer at the point of sale in a supermarket, service station or other sales outlet, other than a bag which falls within a class of bag specified in regulations under subsection (2) as being a class of bag excepted from this definition. It is not disputed that the bags the subject matter of these proceedings are made wholly or in part of plastic. Having regard to the contentions of the applicant regarding the supply of bags and their suitability for use, it is important to note that this condition does not provide that the bags must be provided at the point of sale and/or that they must be suitable for use by customers at the point of sale for the purposes of carrying household groceries and household staples. Rather, as noted above, the second condition of the statutory conditions is that the bag must be suitable for use by a customer at the point of sale in a supermarket, service station or other sales outlet. The third statutory condition is that the bag must not fall within a class of bag that is exempted. Article 5 of the 2001 Regulations exempts plastic bags used solely to contain fresh fish, meat, poultry fruit, nuts, vegetables, dairy products, or cooked food provided that such bags are not greater in dimension than 225mm in width by 345mm in depth by 450mm in length. Thus, if the bags are not used solely to contain the said specified items, they are not excepted from the definition of "plastic bag". Moreover, even if the bags are solely used to contain the said specified items, they are not excepted from the definition of "plastic bag" if they are greater than the specified dimensions.

5.6 Contrary to the applicant's contentions, it is not the case that "the 2001 regulations only apply to plastic bags which are supplied at the point of sale and which are suitable for use by customers at the point of sale for the purposes of carrying household groceries and household staples". As noted by Ronan Mulhall in his first affidavit sworn on behalf of the respondents at paragraph 25:

> "The plastic bags at issue are entirely suitable for use at the point of sale in a supermarket, service station or other sales outlet by customers who are only purchasing a single item or, indeed, a number of small items … while the plastic bags may be considered 'flimsy' as compared to re-usable bags, they are still suitable for use at the point of sale and, moreover, they present litter and waste problems when available in large quantities free of charge … if the Oireachtas had intended that the quality/flimsiness of the plastic bag should be a factor in determining the applicability of the levy, a specific reference to quality/flimsiness would have been made in the legislation."

The plastic bags at issue are sufficiently big and robust for use to carry an extensive range of groceries and goods supplied by supermarkets such as Dunnes Stores. Even if particular plastic bags were not considered by customers to be sufficiently robust for particular purposes, the customers could seek to circumvent that problem by double bagging or triple bagging the items being purchased. Indeed, this fact alone highlights the importance of the plastic bags at issue being subject to the levy system from an environmental perspective.

5.7 The contention of the applicant that the words "suitable for use by a customer at the point of sale in a supermarket" mean "in practical terms that the customers can use the bag for carrying ordinary grocery staple goods" is fundamentally misplaced. As Mr Mulhall observes at paragraph 33:-

> "… It is clear from section 72(1) of the 1996 Act that the definition of a 'plastic bag' is not limited to a bag that a customer can use 'for carrying ordinary grocery staple goods'. Apart from the fact that those words do not appear - whether expressly or impliedly - in the definition of a 'plastic bag', Mr. Howard's contention ignores the fact that supermarkets are not the only sales outlets which fall within the ambit of the definition; the definition also encompasses 'service stations' and 'other sales outlet'. The words ordinary staple goods which, it is appropriate to reiterate, do not appear in the definition of plastic bag obviously have no application in respect of very many sales outlets, including, for example, music stores."

The contention of the applicant that the legislation provides for the imposition of levies on bags which "are supplied at the point of sale" is based on a misreading of the legislative provisions. Moreover, as Mr Mulhall observes, this contention involves an absurd construction of the legislative provisions:-

> "On the construction advanced by Dunnes Stores, retailers could leave plastic bags of any dimension anywhere in their shops, other than at a point of sale, and none of those plastic bags would be subject to a levy. It is very difficult to imagine that the Oireachtas would have intended to enact an environmental levy system which would so obviously and utterly fail to achieve its objectives. In any event, I say and believe that it is plain from the wording of the legislative provisions at issue that they do not bear the construction for which Dunnes Stores contends"

The matters addressed above further reinforce the conclusion that the claims of the applicant herein are founded upon a fundamental misreading of the statutory and regulatory provisions at issue.

5.8 The applicant seeks to challenge the validity of section 72(5)(b) of the 1996 Act having regard to Article 15.2.1 of the Constitution on two grounds. First, the applicant contends that the section entails an impermissible delegation of the legislative power of the Oireachtas in that it purports to authorise the second respondent by regulations to adapt, with or without modifications, the provisions of any enactment in relation to the estimation, collection and recovery of taxes. Secondly, the applicant contends that the section does not contain sufficient principles and policies, with the result that the discretion of the second respondent is impermissibly broad and unfettered. The respondent submits that each of these contentions is without substance for the reasons outlined below. Before addressing the substantive grounds upon which the applicant purports to challenge the constitutional validity of section 72(5)(b) of the 1996 Act, it is necessary to first address the question of whether the applicant has the locus standi necessary to make the challenge. It is not asserted in any of the grounds upon which the applicant obtained leave to apply for Judicial Review that the applicant is adversely affected by an article of the 2001 Regulations which adapts the provisions of an enactment in relation to the estimation, collection and recovery of taxes. In *A v Governor of Arbour Hill* Hardiman J stated as follows in relation to the *locus standi* in constitutional challenges:-

> "… a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis…"

It is clear that the applicant does not have *locus standi* to challenge the validity of section 72(5)(b) of the 1996 Act.

5.9 Even if the applicant had *locus standi* the first point to note was that the impugned provision enjoys the presumption of constitutionality. Thus, it is necessary for the Court to consider whether section 72(5)(b) could reasonably be construed in a manner that is consistent with the Constitution. If, having approached the question of whether the section is constitutionally valid in this manner, the Court concludes that the section could reasonably be construed in a manner that accords with the Constitution, the Court is obliged to adopt that construction and to uphold the validity of the section. As the Supreme Court explained in *McDonald v. Bord na gCon* [1965] IR 217 at 223:-

> " …it is only where there is no construction reasonably open which is not repugnant to the Constitution that the provision should be held to be invalid having regard to the provisions of the Constitution."

Section 72(5)(b) provides that the Minister may adapt with or without modifications, the provisions of any enactment relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment. The discretion which section 72(5)(b) confers can clearly be exercised by the Minister making regulations so as to ensure that what is done is truly regulatory or administrative only and does not constitute the making, repealing or amending of law in a manner which would be invalid having regard to the provisions of the Constitution.

5.10 The second ground upon which the applicant purports to challenge the constitutional validity of section 72(5)(b) is that the section does not contain sufficient principles and policies, and as a result that the discretion of the second respondent is impermissibly broad and unfettered. This argument is based on a misapplication of the established principles regarding the power of the Oireachtas to delegate legislative power. The law in this area is governed by the judgment in *Cityview Press Ltd v Anco* [1980] IR 381. In that case the Supreme Court held that:-

> "The test is whether that which is challenged as unauthorised delegation of parliamentary power is more that a mere giving effect to principles and policies which are contained in the statute itself."

The Oireachtas has defined the "plastic bags" which are to be the subject of the regulations in section 72(1) of the 1996 Act. This definition carefully prescribes the nature of the bags which are to be the subject of the levy, while also enabling the Minister to except certain classes of bag therefrom. The Oireachtas enacted detailed provisions regarding the amount of the said levy. The Oireachtas specified the person(s) who are required to pay the levy. The Oireachtas specified a range of other matters including the times at which payment of the levy shall be made and the form of such payment. The Oireachtas also enacted detailed provisions in respect of the consequences of a failure to pay the levy. It is clear therefore that the 1996 Act does contain principles and policies. The impugned provision merely enables the filling in of details on the basis laid down in the statute. The existence of the levy, the subject matter of the levy, the obligation to pay the levy, the amount of the levy, the specification of the persons to whom the levy is payable and the collection and recovery of the levy are addressed in considerable detail in the 1996 Act and the impugned legislative provision is clearly intended to empower the Minister simply to fill in details on the basis of the law enacted by the Oireachtas in that regard. It is clear, therefore, that the challenge to section 72(5)(b) on the basis that it does not contain sufficient principles and policies and thus breaches Article 15.2.1 of the Constitution is misconceived.

5.11 The respondents further argue that the purported challenge to the constitutional validity of section 72(5)(b) is misconceived for another fundamental reason. Section 72(5)(b) is necessitated by the obligations of membership of the European Union and/or the Communities within the meaning of Article 29.4 of the Constitution. Article 29.4.6 provides as follow:

> "No provision of this Constitution invalidates laws enacted, acts done or measures adopted by the state, before, on or after the entry into force of the Treaty of Lisbon, that are necessitated by the obligations of membership of the European Union…"

Section 2 of the 1996 Act provides that the purposes for which the provisions of the Act were enacted include the purpose of giving effect to the Community Acts specified in the table to that section. The Community Acts specified are the Waste Directives including Directive 91/156/EEC article 4 of which states:-

> "Member States shall take appropriate measures to encourage (a) first, the prevention or reduction of waste and its harmfulness…"

The respondents submit that the method chosen by the state to satisfy its obligation under Directive 91/156/EEC was an appropriate method and that the statutory provisions at issue did not go beyond what was required to implement the Directive. Accordingly, the impugned statutory provision is not invalid having regard to the provisions of the Constitution.

5.12 Strictly without prejudice to the submissions set out above, the respondents argue that if part of section 72(5)(b) of the 1996 Act is contrary to the provisions of the Constitution on the ground that it purports to authorise the second respondent by regulations to adapt, with or without modifications, the provisions of any enactment in relation to the estimation, collection and/or recovery of taxes as alleged, it does not follow that the entirety of that section is invalid insofar as it otherwise provides for the conferral of powers on a collection authority with respect to the collection and recovery of the levy. The obligation to consider severance is expressly rooted in Article 15.2.4 of the Constitution and is an aspect of the constitutionally mandated separation of powers including the respect which one organ of the State owes to another. Insofar as is necessary, the respondents seek an Order severing only the part of section 72(5) (b) of the 1996 Act that is invalid on the said ground.

5.13 The applicant also seeks a declaration that the first respondent acted in breach of fair procedures, and in breach of Article 6 of the European Convention on Human Rights, on the grounds that the first respondent has failed or refused to provide details of the basis for each of the assessments, with the result that the applicant has been prejudiced in its ability to call evidence or to make submissions or otherwise advance its appeals against the assessments. Article 6 of the European Convention on Human Rights however has no application in respect of proceedings relating to the assessment or imposition of tax. In *Fortune v The Revenue Commissioners* [2009] IEHC 28 at paragraph 80 the Court stated: -

> "…it has long been accepted by the European Court on Human Rights that Article 6 has no application whatsoever in respect of proceedings relating to the assessment or imposition of tax."

The complaint of a breach of fair procedures is also without substance. The applicant and its professional advisers had extensive interaction with the Revenue Commissioners between February 2007 and December 2009. The Revenue Commissioners also furnished extensive documentation to the applicant and its advisors during this time. Furthermore material relevant to the levy is within the control, power, and/or procurement of the applicant. It is stated by Mr McDonnell in his first affidavit at paragraph 13:-

> "At a meeting on 3 November 2009, I provided Larry Howard and Noel Fox, (representatives of Dunnes Stores) the details available to me at that time on which the calculations of the assessments were based. All queries raised on behalf of Dunnes Stores at that meeting were addressed. A draft copy of the detailed calculations prepared by me at that time was given to the representative of Dunnes Stores during the course of the meeting. In quantifying the assessments, and having taken into consideration the representations of Dunnes Stores, I made an allowance in respect of plastic bags which were stolen, plastic bags which were regarded as damaged/waste, and plastic bags which were sent to Northern Ireland."

It is notable that, in his second affidavit in responding to Mr Mc Donnell's claim, Mr Howard does not deny that, at the meeting on 3 November 2009, he and Mr Fox were provided with the details of the basis upon which the calculations of the assessments were made. Nor does he dispute the statement that at that meeting, all queries raised on behalf of Dunnes Stores were addressed. Instead, he asserts that the information provided was "clearly inadequate" and that certain specified information is not available to the applicant. The first of the matters which the applicant asserts it needs to understand is "in what amount the calculations relate to bags supplied at point of sale, to back of store 'flimsy' bags, and to bags for Northern Ireland, which were never used in Ireland." For the reasons they have already addressed, the respondents argue that the contentions of the applicant in respect of "point of sale bags" and "flimsy bags" are misplaced, as are, a *fortiori*, the contentions in respect of an alleged breach of fair procedure regarding the provision of information concerning these matters. The authorities upon which the applicant relies in support of its complaint of a breach of fair procedures do not provide any basis for concluding that there was such a breach in the factual circumstances of the applicant's case. The applicant seeks to rely on *Keogh v Criminal Assets Bureau* [2004] 2 IR 59, that case concerned a failure by the CAB, as agents of the Revenue Commissioners, to notify a lay person of his right of appeal and the 30 day time period for exercising that right when responding to correspondence from the applicant in which he expressed his wish to appeal. The factual backdrop to the present case is manifestly different. First, the Revenue Commissioners were not dealing with a lay person, they were dealing with a sophisticated commercial operator which had access to, and clearly availed of, professional advice in the context of its dealings with the Revenue Commissioners. Secondly the applicant in *Keogh* was deprived of a right of appeal to the Appeal Commissioners because of the failure of the CAB/Revenue Commissioners to advise him of that right and the time period within which it had to be exercised. In the present case, the applicant was clearly aware of its right of appeal and actually exercised that right. Thirdly, the information which it is contended herein the Revenue Commissioners were obliged to provide was clearly not such as to impede the applicant from exercising its right to appeal or in formulating with precision its grounds of appeal. Fourthly, it is notable that it was only in response to a request for certain information to enable the appeal to be progressed that the applicant asserted it required further information to enable it to understand the basis for the assessments. The respondents submit that the claim of the applicant that the Revenue Commissioners acted in breach of fair procedures and/or in breach of natural and or constitutional justice is without substance.

6. Decision of the Court

Was the plastic bag levy intended to apply only to plastic carrier bags supplied at checkout?

6.1 The charging section is contained in s.72 of the Waste Management Act 1996 (as inserted by s. 9 of the Waste Management

(Amendment) Act 1996) which provides for the imposition of an environmental levy in respect of plastic bags. Subsection (2) confers on the second respondent a power to make regulations for that purpose as follows:-

> "The Minster may, with the consent of the Government, make regulations providing that there shall be chargeable, leviable and payable a levy (which shall be known as an 'environmental levy' and is in this section referred to as the 'levy' in respect of the supply to customers, at the point of sale to them of the goods or products to be placed in the bags, or otherwise of plastic bags in or at a specified class or classes of supermarket, service station or other sales outlet."

The applicant argues that this section should be interpreted so as to mean that only bags supplied at point of sale are to be levied. In arguing this they focus on the positioning of the phrase "or otherwise" and argue that it makes the meaning of the section ambiguous. They argue for an interpretation that means the phrase is intended to prevent customers taking extra free bags into which goods are not actually being placed at point of sale. They further argue the bags to be levied must be such as are suitable across the range of sales outlets to which the levy applies. They argue the flimsy bags sought to be levied are not so suitable.

6.2 In the first place, it seems to me that the applicant's case in this regard takes no account of the detailed provisions that define what bags are exempted from the levy. If, as the applicants argue the requirement for applicability of the levy was supply at point of sale, what is the point of providing for exemptions in respect of the flimsy bags that are provided within shops for wrapping food products such as meat, bread and fish. A point of sale requirement for applicability of the levy would have obviated the need for such exemptions.

6.3 On the interpretation of statutes the Court must be guided by the principles outlined in *Howard v Commissioners of Public Works* [1994] 1 I.R 101. Blayney J in that case cited with approval the following passage from *Craies on Statute Law* (7th ed., Sweet & Maxwell, 1971) p71:-

> "The cardinal rule for the construction of Acts of Parliament is that they should be construed according to the intention expressed in the Acts themselves. If the words of the statute are themselves precise and unambiguous, then no more can be necessary that to expound those words in their ordinary and natural sense. The words themselves alone do in such cases best declare the intention of the lawgiver. The tribunal that has to construe an Act of a legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words, it is natural to enquire what is the subject matter with respect to which they are used and the object in view'"

This formulation was approved by Denham J in *B (D) v Minister for Health and Children* [2003] 3 I.R. 12 at 21 she summarised the approval as follows:-

> "In construing statutes, words should be given their natural and ordinary meaning. The approach taken by the courts to the construction of statutes was described by Blaney J in *Howard v The Commissioner of Public Works* [1994] I IR 101. He emphasised that the cardinal rule for the construction of statutes was that they be construed according to the intention expressed in the Acts themselves. If the words of the statute are precise and unambiguous then no more is necessary than to give them their ordinary sense. When the words are plain and unambiguous they declare best the intention of the legislature. If the meaning of a statute is not plain then a court may move on to apply other rules of construction; it is not the role of the court to speculate as to the intention of the legislature. In that case I held also that statutes should be construed according to the intention expressed in the legislation and that the words used in the statute best declare the intent of the Act. I took a similar approach in *M'OC v Minister for Health* [2002] 1 I.R. 234 holding that it was well established that in construing statutes, effect should be given to clear and unambiguous words, for the words of the statute best declare the purpose of the Act."

Is there ambiguity in the subject provision here? If there is then the Court should look to the intention expressed in the legislation where the words best declare the intent of the Act. Initially I must confess I did think there was a certain ambiguity in the wording in question. As I focussed more on this section during the hearing and in preparation of this judgment I have come to the view that there is not. It seems to me that, although somewhat awkwardly phrased, the section when carefully read is clear. The word "otherwise" means otherwise than at the point of sale. The section specifies firstly the point of sale as a location of supply and then broadens that out by the word otherwise. This it seems to me is plain on the basis of the words used. There is something of a cross over here from looking to the overall legislative structure and the intent derived therefrom which in this case clarifies the meaning of the words. Thus is blended the modus of determining the true clear meaning and resolving ambiguity in the statutory provision. I do not consider this impermissible because words must always be seen in their true context in order to understand their meaning. Finding this context may and in this case does reveal the clear meaning of the statutory provision.

Even were this not so, looking to the Act as a whole, it seems to me that the levy is clearly not limited to carrier bags as is contended by the applicants. The point of the statutory provision is to reduce as much as possible the presence of discarded plastic bags littering our towns and countryside. It would be most improbable that the legislature would exempt plastic bags that are supplied anywhere other than at point of sale. Such a provision would miss large numbers of plastic bags and diminish greatly the impact of the Act. It would also signally fail to meet the general requirements of Directive 91/156 EEC, Article 4 of which provides *inter alia* that:-

> "Member States shall take appropriate measures to encourage (a) first, the prevention or reduction of waste production and its harmfulness [and] (b) second (i) the recovery of waste by means or recycling, re-use or reclamation or any other process with a view to extracting secondary raw materials or (ii) the use of waste as a source of energy."

In my view the levy is applicable to all plastic bags provided at supermarkets, shops and service stations save those that fall within the exemptions provided.

Was the Minister required to specify classes of sales outlets to which the levy applied?
6.4 Must the Minister specify classes of sales outlets to which the levy applied? Classes are a subset of all. If the Minister is entitled without limitation to specify classes of outlets to which the levy will apply then it is open to him to specify all classes. There can be no practical benefit to have the Minister go through a formulaic process of nominating each class of outlet separately.

Was a valid legal basis for the regulation invoked?
6.5 As to the legal basis for the regulations I cannot accept the argument put forward by the applicant. The legal basis cited is wider than that argued by the applicant. The regulation is based not only upon s.29(3) of the 1996 Act, but also upon s.7 and s. 72 of the 1996 Act. The applicant's argument is essentially that because the regulations closely mirror the language used in s. 72 the Court should hold they are actually based on s.72 alone. This is to invite the Court to ignore the clear words of the statute. I cannot do this. The regulations are stated to be based upon s.29(3) and s.7 as well as s.72 and as such provide a clear and adequate basis for

the Minister to make regulations which require the imposition on certain owners of premises such as the applicants herein of a levy on plastic bags supplied by them other than exempted bags.

Was there a breach of the rules of fair procedures?
6.6 In the first place Article 6 of the European Convention on Human Rights has no application to proceedings relating to the imposition or assessment of tax. In *Fortune v Revenue Commissioners* [2009] IEHC 28 O'Neill J stated:-

> "It has long been accepted by the European Court on Human Rights that Article 6 has no application whatsoever in respect of proceedings relating to the assessment or imposition of tax."

I respectfully agree with this. Secondly, the applicant's claim in this regard is based on the alleged failure by the respondents to provide the applicant with the necessary information as to how it calculated the levy due. On questioning, the respondents said only that the assessment made was its "best judgment". This the applicant says does not provide sufficient information on the decision to allow it make an appeal. It is undoubtedly the case that the respondents are obliged to follow fair procedures. The question however is what constitutes fairness in the instant case. Here, the applicant is a large, well resourced and professionally advised body. The contrast with *Keogh v Criminal Assets Bureau* [2004] 2 IR 59 could scarcely be more pronounced. I consider the judgment in *TJ v Criminal Assets Bureau* [2008] IEHC 168 to be more apt and helpful in the circumstances. In that case Gilligan J noted:-

> "The whole basis of the Irish taxation system is developed on the premise of self assessment. In this case, as in any case, the applicant is entitled to professional advice, which he has availed of, and he is the person who is best placed to prepare a computation required for self assessment on the basis of any income and/or gains that arose within the relevant tax period. In effect, the applicant is seeking discovery of all relevant information available to the respondents against a background where he has, by way of self assessment, set out what he knows or ought to know, is the income and gains made by him in the relevant period. It is quite clear that the whole basis of self assessment would be undermined if, having made a return which was not accepted by the respondents, the applicant was entitled to access all the relevant information that was available to the respondents. The issue, in any event, is governed by legislation and there is no constitutional challenge to that legislation. The respondents are only required to make an assessment on the person concerned in such sum as according to the best of the Inspector's judgment ought to be charged on that person. The applicant in this case has the right of an appeal to the Appeal Commissioners and the right to a further appeal to the Circuit Court and the right to a further appeal on a point of law to the High Court and from there to the Supreme Court. Any reasonable approach dictates that if the applicant, on appeal to the Appeal Commissioners or to the Circuit Court, can demonstrate some form of prejudice, then an adjournment in accordance with fair procedures would have to be granted, and if not granted, the applicant would have an entitlement to bring judicial review proceedings. There are adequate safeguards in position to protect the applicant in the event that he is in some way prejudiced, but in any event it has to be borne in mind that since an assessment can only relate to the applicant's own income and gain, any materially relevant matter would have to be or have been in the knowledge and in the power procurement and control of the applicant."

This passage was cited with approval by Charlton J. in *Menolly Holmes v The Appeal Commissioners* (Unreported, High Court, 26th February 2010) at paragraph 22. In this case, there was extensive communication written and verbal between the applicant's professional advisors and the respondents. It is hard to understand what it is the applicant does not know. In his first affidavit dated 3rd June, 2010 Joseph McDonnell stated:-

> "At a meeting on 3rd November 2009, I provided to Larry Howard and Noel Fox, (representatives of Dunnes Stores) the details available to me at that time on which the calculations of the assessments were based. All queries raised on behalf of Dunnes Stores at that meeting were addressed. A draft copy of the detailed calculations prepared by me at that time was given to the representatives of Dunnes Stores during the course of the meeting. In quantifying the assessments, and having taken into consideration the representations of Dunnes Stores, I made an allowance in respect of plastic bags which were stolen, plastic bags which were regarded as damaged/waste, and plastic bags which were sent to Northern Ireland."

In his responding affidavit Larry Howard does not deny any of this. In light of the circumstances of this particular case, I can see nothing unfair in the procedures followed by the respondents and I find that there is no substance to the complaint.

Was there an unconstitutional delegation of legislative power to the Minister under Section 72 (5)?
6.7 The respondents firstly challenge the *locus standi* of the applicant to bring such a challenge. They argue that the applicant's proceedings do not either claim or reveal any way in which the applicant is adversely affected by the adoption of the provisions of the tax code to the estimation, collection and recovery of the levy. The principles of *locus standi* are best illustrated by reference to the leading decision of *Cahill v Sutton* [1980] IR 269. O'Higgins CJ stated as follows at 276:-

> "In the result, the alleged invalidity of the sub section infringed no right of the plaintiff nor caused her any prejudice. For this reason the Court felt bound to consider whether the plaintiff had a sufficient standing to raise this question of the validity of the sub-section. I am satisfied that she has not that standing and in this respect, I fully agree and endorse the judgment which is about to be delivered by Mr. Justice Henchy.
>
> This Court's jurisdiction, and that of the High Court, to decide questions concerning the validity of laws passed by the Oireachtas is essential to the preservation and proper functioning of the Constitution itself. Without the exercise of such a jurisdiction, the checks and balances of the Constitution would cease to operate and those rights and liberties which are both the heritage and the mark of free men would be endangered. However, the jurisdiction should be exercised for the purpose for which it was conferred- in protection of the Constitution and of the rights and liberties thereby conferred. Where the person who questions the validity of a law can point to no right of his which has been broken, endangered or threatened by reason of the alleged invalidity, then, if nothing more can be advanced, the Courts should not entertain a question so raised. To do so would be to make of the Courts the happy hunting ground of the busybody and the crank. Worse still, it would result in a jurisdiction which ought to be prized as the citizen's shield and protection becoming debased and devalued."

Henchy J stated as follows at 286:-

> "The primary rule as to standing in constitutional matters is that the person challenging the constitutionality of the statute, or some other person for whom he is deemed by the court to be entitled to speak, must be able to assert that, because of the alleged unconstitutionality, his or that other person's interests have been adversely affected, or stand in

real or imminent danger of being adversely affected by the operation of the statute.

On this test the plaintiff must be held to be disentitled to raise the allegation of unconstitutionality on which she relies. Even if the Act of 1957 contained the saving clause whose absence is said to amount to an unconstitutionality, she would still be barred by the statute from suing. So the alleged unconstitutionality cannot affect her adversely, nor can it affect anybody whose alter ego or surrogate she could be said to be. As to such other persons, although the statute was passed in 1957, the plaintiff is unable to instance any person who has been precluded from suing for damages because of the absence from the statute of the saving clause for which she contends. Therefore, her case has the insubstantiality of pure hypothesis. While it is true that she herself would benefit, in a tangential or oblique way, from a declaration of unconstitutionality, in that the consequential statutory vacuum would enable her to sue, that is an immaterial consideration in view of her failure to meet the threshold qualification of being in a position to argue, personally or vicariously, a live issue of prejudice in the sense indicated."

Further in *A v. Governor of Arbour Hill* [2006] 4 IR 88 Hardiman J stated at 165:-

"… a person who seeks to invalidate a statutory provision must do so by reference to the effect of the provision on his own rights. He cannot seek to attack the section on a general or hypothetical basis and specifically may not rely on its effect on the rights of a third party: see Cahill v Sutton. In other words, he is confined to the actual facts of his case and cannot make up others which would suit him better."

Applying those principles to this case, the levy falls to be estimated, collected and recovered in accordance with some arrangement to be set in place. It seems to me that the applicant is in some difficulty on this point. They ask the court to assume that the adaptation of the tax code is less favourable than any other way of collecting the levy. They ask the court to hypothesize which is something it cannot do. I consider the applicant does not have *locus standi* to raise this argument because they cannot show how they are adversely affected by the adaptation of the tax code to the recovery of the levy in question as opposed to some other unspecified system of estimating, collecting and recovering the levy.

6.8 I think that I should however express a view on the argument advanced by the applicant that the adaptation of the tax code to the recovery of the levy is constitutionally flawed. As I understand it two grounds are advanced:-

(a) The application by regulation of the tax code amends primary law.

(b) There are no principles and policies set out in the primary legislation. These are contained in the regulations.

(a) In my view the adaptation of the tax code does not amend primary law. No part of the tax code is altered by this adaptation. It is applied *mutatis mutandis* and remains unaltered following that adaptation. Would there be any benefit obtained by the Minister copying and pasting the relevant sections of the tax code into the Act? I cannot see any. Nor can I see anyway in which anyone is adversely affected thereby. It seems to me that such an adaptation where possible is a nearly ideal way for the Minister to fill in the details by using such a well tried and trusted *modus operandi*.

(b) The principle established by the case law is that the Oireachtas makes the laws containing the principles and policies of the legislation. The Minister may by regulation fill in the details. The courts have allowed that the Minister may be given very broad powers. Moreover the constitutionality of the legislative provision must be presumed. The test is set out in *Cityview Press v An Comhairle Oiliuna* [1980] IR 381 O'Higgins C.J states as follows at 399:-

"In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to the principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits- if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body- there is no unauthorised delegation of the legislative power.

In *John Grace Fried Chicken Limited, and Ors v The Catering Joint Labour Committee, and Ors* [2011] IEHC 277 Feeney J stated at 284:-

"The decisions of the Supreme Court demonstrate that the principles and policies test is a flexible one which must be applied to the differing factual scenarios and legislative contexts with due regard to the complexity involved. It is also clear from the *Laurentiu* decision that the principles and policies test is to be applied in accordance with constitutional presumptions as to the interpretation of legislation and that the actions of Ministers and officials are to be presumed to be constitutional. For a delegation to be unlawful the power delegated must exceed the mere giving effect to principles and policies contained in the statute.

In applying the flexible test, the courts have recognised the need for subordinate legislation. The courts, however, whilst recognising the need for subordinate legislation, have in applying the principles and policies test consistently used as a cornerstone of that test the issue as to whether or not subordinate legislation achieves and applies principles and policies and purposes identified in legislation."

In this instance, the principles and policies seem very clear. The legislation seeks to prevent the generation and encourage the recovery of waste and specifically plastic bags as used widely in retail outlets. In order to achieve this it provides for the levy in question on such bags. Section 72 (5)(b) of the Act provides quite specifically for the adaptation of the tax acts for the purpose of collecting that levy. Regulation 15 does just exactly that. It seems to me to be a classic example of the principles and policies test in action. The Oireachtas has set out in some detail the principles and policies and the Minister has set in train the mechanics.

6.9 In light of the above I do not think it is necessary to address the question as to whether the 1996 Act was necessitated by Ireland's membership of the European Union. The question of severance does not arise.

6.10 The reliefs sought are refused