Neutral Citation Number: [2007] IEHC 311

THE HIGH COURT
JUDICIAL REVIEW

[2005 NO. 283 JR]

BETWEEN

CORK COUNTY COUNCIL

APPLICANT

AND
VALUATION TRIBUNAL

RESPONDENT

AND
ESAT TELECOM AND COMMISSIONER OF VALUATION

NOTICE PARTIES

Judgment of Ms. Justice Dunne delivered on the 31st day of July 2007

1. The applicant is a local authority and rating authority. It seeks the following relief by way of judicial review.

> "An order of *certiorari* quashing the decision and/or determination and/or judgment of the Valuation Tribunal dated the 13th December 2004,(perfected on the 5th January 2005, and received by the applicant on the 7th January 2005) between ESAT Telecom, appellant and Commissioner of Valuation, respondent in relation to rateable valuation of cable located between the townlands of Carhoo, Whitechurch, Cork Upper, Co. Cork and Rathmorgan, Rathluirc, Co. Cork, (Appeal Nos. VA01/1/015 and VA 01/1/016) and whereby the said tribunal inter alia determined to strike out the revisions previously determined by the Commissioner of Valuation in fixing rateable valuations of IR£720 (€914.21) VA01/1/015 and IR£1,440 (€1828.42) (VA01/1/016)."

2. The applicant also seeks an order remitting the said appeals to the Valuation Tribunal with appropriate directions.

3. The principle complaint of the applicant herein is that the respondent failed to serve on the applicant all documentation and information in writing in connection with the appeals, including a précis of evidence, in accordance with the provisions of s. 36(2) of the Valuation Act 2001. By reason of that alleged failure, it is contended that the applicant was denied or deprived of the opportunity to attend at the Valuation Tribunal, to be heard and to adduce evidence at the hearing of the appeals and to have an opportunity to respond to the arguments made. It was also contended that the applicant was denied the opportunity to respond to a position not previously advanced. It is contended that the failure to comply with the provisions of s. 36(2) of the Valuation Act, is an error in law or ultra vires the powers of the respondent and that the failure breached the applicant's rights to fair procedures and/or natural and constitutional justice.

4. The applicant also contended that by failing to make its determination upon the said appeals within the time prescribed by s. 37(2) of the 2001 Act, the respondent acted without or in excess of jurisdiction.

Background

5. In June 1998, the applicant sought revision of two hereditaments, being railway lines running through the townlands of Rathmorgan and Carhoo, then in the occupation of Iarnród Eireann with a view to valuing the fibre optic cable then being laid along the railway line for the benefit of the first named notice party (ESAT). The request for revision was as follows:-

> "Revise as necessary to value fibre optic telecommunications cable for ESAT Telecom between the townland of Carhoo at point A and the townland of Rathmorgan at point B on attached map of Cork/Charleville railway line."

6. Section 3(4)(a) and (b) of the Valuation Act 1988, was applicable to the request for revision. Section 3(4)(a) provides:-

> "(a) Where an application under subsection (1) of this section in relation to any property is made by any person other than the owner or occupier of that property, the owner and occupier, if known, shall be notified by the rating authority of the application.
>
> (b) The owner and occupier, where known, shall be notified by the rating authority of the determination of the application and of his right to appeal in accordance with sections 19 and 31 of the Act of 1852 against the valuation determined by the Commissioner of Valuation and shall also be notified by the rating authority of the outcome of that appeal."

7. In an attempt to comply with the provision of s. 3(4) of the 1988 Act, the applicant notified by letter Iarnród Eirreann as the occupier and ESAT of the revision request by ordinary pre-paid post. The notification to ESAT was addressed to "8 Upper Mount Street, Dublin 2." It is not in dispute that ESAT had last occupied offices at 8 Upper Mount Street, Dublin 2, in 1995. In June 1998, its offices were located at the Malt House, Grand Canal Quay, Dublin 2.

8. Arising from the request for revision, two new hereditaments were created, bearing valuation record Nos. 2094519 (Rathmorgan) and 2094506 (Carhoo). That decision was the subject of an appeal in writing to the applicant against the revised assessments. Among the grounds of appeal the following was stated:-

> "The assessment is bad in law as it does not comply with the provisions of the Valuation Acts 1852 – 1988 in that, *inter alia*:
>
> 1. Not notice pursuant to s. 3(4)(a) of the Valuation Act 1988 was served on the appellant.
>
> 2. No notice pursuant to s. 3(4)(b) of the Valuation Act 1988 has been served on the appellant."

9. Following that, the same grounds of appeal as to notification were contained in the appeals of ESAT to the Valuation Tribunal made pursuant to the provisions of s. 3(5)(a) of the Valuation Act 1988. Copies of those notices of appeal were transmitted by the Valuation Tribunal to the applicant herein on the 2nd May 2001. There is a dispute between the applicant, the respondent and ESAT as to whether or not this issue was dealt with in the course of the appeal to the second named notice party, the Commissioner of Valuation. Val Cotter on behalf of the applicant herein in a letter dated the 20th November 2003, commented on the manner in which the Valuation Tribunal dealt with the issue of notification. He stated:-

> "As alluded to in your letter, the Council did not enter or take a part in the appeal to Tribunal. This was a conscious decision by this authority based on the fact that the matter of non-compliance with s. 3(4)(a) of the Valuation Act 1988, was not pursued by the appellant at first appeal stage and that the Commissioner of Valuation accordingly was satisfied that the requirements of said section had been complied with. However, the appellant raised a new argument in relation to incorrect address at Tribunal. This was to the surprise of the Commissioner of Valuation and to the total disadvantage of this council, who were put in the impossible position of being the party whose notification was made subject to the strictest scrutiny and were unable to account for their actions or represent or defend themselves.
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> I am sure that it was not the intention of the appellant and/or their agents to create a deception in this instance. However, the out turn is that the Council was misled, the Commissioner of Valuation was misled and that ultimately the Tribunal by allowing this new argument, if supported by your determination, may reward this course."

10. The affidavit of Audrey O'Sullivan on behalf of the Valuation Tribunal pointed out that as the notices of appeal had been furnished to the applicant herein it knew that the issue of notification pursuant to s. 3(4)(a) of the Valuation Act 1988, was being appealed to the Valuation Tribunal and had not been disposed of at the stage of the first appeal dealt with by the Commissioner of Valuation. She went on to aver that the assertion of Val Cotter in the letter of the 20th November 2003, referred to above as to the decision of the applicant not to enter and take part in the appeal to the Tribunal on the basis that the matter of non-compliance had not been pursued at the first appeals stage is without merit and conflicts with the written record of the facts of the case.

11. In an affidavit dated the 12th October 2006, William Tuite, a Chartered Surveyor in an affidavit sworn herein on behalf of ESAT averred:-

> "During the appeal process with took place between January and March 2001, I raised and pursued the issue of notification under s. 3(4)(a) of the Valuation Act 1988, at a meeting in the valuation office on 26th February 2001, attended by the appeal valuer of the second named notice party, Terence Dineen ,a staff valuer of the second named notice party, Frank Gregg, a colleague, Des Killen and Mr. Tuite. The appeal valuer, Terence Dineen, refused point blank to engage in any discussion on the issue, apart from stating that notices had been served. When we requested copies of the alleged notices served, none were forthcoming."

12. It is necessary to refer to the affidavits of Terry Dineen sworn herein in relation to this point. Mr. Dineen a District Valuer in the office of the Commissioner of Valuation swore an affidavit on the 19th October 2006. In the affidavit of Mr. Dineen, he referred to the fact that the appeals were originally dealt with by his former colleague a Tom Stapleton. On the 19th April 2000, Mr. Staplteton wrote to Messrs William Fry, solicitors for ESAT enclosing standard forms to be completed in relation to the then upcoming appeals. Mr. Stapleton communicated the information he had received from Cork County Council indicating that the Council had complied with the requirements of s. 3(4)(a) and s. 3(4)(b) of the Valuation Act 1998. Mr. Dineen then referred to the various dealings he had in relation to the appeals in correspondence from a number of named parties. He averred that in the extensive exchange of communications there was no reference to or any suggestion of any correspondence intended for ESAT having been sent to an incorrect address. He further averred:-

> "I say categorically that no reference was made orally or at all claiming that any notice in relation to the valuation of the hereditaments in question had been sent to an incorrect address. No issue of any notice having been sent to an incorrect address arose at any time at the stage at first appeal to Commissioner of Valuation."

13. He went on to add that he first became aware that the issue of an incorrect address was being raised by ESAT on receipt shortly before the Valuation Tribunal Appeal hearing of the 4th July 2003 of a précis of evidence prepared on behalf of ESAT for that hearing.

14. Mr. Dineen swore a second affidavit in regard to this issue on the 21st December 2006. He indicated that he was making the affidavit for the purpose of clarifying insofar as he could the question whether the issue of incorrect notification was pursued at first appeal stage by or on behalf of ESAT. He reiterated the contents of his previous affidavit and referred again to the letter of the 19th April 2000, from Mr. Stapleton to Messrs William Fry. He stated that it was his understanding from that letter that the question of notification had been dealt with by Cork County Council, the relevant rating authority. None of the correspondence he had previously exhibited and referred to made any mention of the issue of notification. He referred to the meeting described by Mr. Tuite at para. 4, of his affidavit sworn on the 12th March 2006, at which meeting Mr. Tuite referred to the fact that:-

> "The appeal valuer Terence Dineen refused point blank to engage in any discussion on the issue apart from stating that notices had been served. When we requested copies of the alleged notices served none were forthcoming."

15. Mr. Dineen went on to say that, to the best of his recollection at the outset of the meeting which he believed took place on the 23rd February 2001, as opposed to the 26th February 2001, as suggested by Mr. Tuite, he indicated to Mr. Tuite and a Mr. Killen that the issue of notification of ESAT as occupier of the property under s. 3(4)(a) of the Act of 1988, had been dealt with by the relevant rating authority, namely Cork County Council. He was uncertain as to whether he had or had not handed copies of the two notices which had been posted by Cork County Council to ESAT in respect of the two appeals in question but he was unable to say that with any certainty. He was clear that he indicated to Mr. Tuite and Mr. Killen that notification of ESAT of the valuation process had been dealt with by the Council. On that basis he said that it was not accurate to say as Mr. Tuite did in his affidavit that Mr. Dineen refused point blank to engage in any discussion on the issue as he understood that that being a matter for Cork County Council, it had been dealt with as he understood it and therefore as he understood it the matter was closed. He added that in correspondence following that particular meeting of the 23rd February 2001, there was no mention of the issue of notification of ESAT.

16. Following the issue of the decision by Mr. Dineen on behalf of the office of the Commissioner of Valuation further correspondence ensued during the course again no mention was made of the issue of notification. Accordingly, Mr. Dineen indicated that he was satisfied having reviewed the office file and on the basis of his recollection that the averment in his previous affidavit that no issue of any notice having been sent to an incorrect address arose at any time of the stage of first appeal is correct. Finally he noted that Mr. Tuite in his affidavit of the 12th October 2006, did not state or raise a suggestion that any notice under S. 3(4)(a) of the Valuation Act 1988, was sent to an incorrect address.

17. A further affidavit was sworn by William Tuite on the 10th January 2007, in response to the affidavits of Val Cotter, Audrey O'Sullivan and the two affidavits of Terry Dineen. So far as the issue of non notification is concerned he reiterated his averment that he raised and pursued verbally, the issue of non notification in the meeting referred to an attended by Mr. Dineen, Mr. Gregg, Des Killen and himself. He went on to state that the indisputable fact of the matter is that the issue of non notification was raised both in writing by the solicitors for ESAT and verbally by him before the Commissioner of Valuation at the first appeal stage. He pointed out that the understanding of Mr. Dineen in relation to the letter of the 19th April 2000, from Tom Stapelton to William Fry's solicitors

does not alter the fact nor does the fact that correspondence from agents for ESAT made no mention of the issue of notification, alter the fact, namely, that there was an issue as to notification. He went on to point out that it was indeed the case as stated by Terry Dineen that no issue of any notification having been sent to an incorrect address was raised by Mr. Tuite or anyone else at the first appeal stage. That was because it was not known that the reason that no notification had been served on ESAT was because it had been sent to an incorrect address, if as he points out that was indeed the case. In those circumstances he added, there could not have been any question of an issue of an incorrect address being raised by or on behalf of ESAT at that stage.

18. As can be seen from the matters outlined above, a key issue put forward on behalf of the applicant is that the issue of notification was not dealt with at the first appeal stage before the office of Commissioner of Valuation and that accordingly, it was not open to ESAT to take that point at the second appeal stage before the Valuation Tribunal. Clearly that view of the facts is challenged on behalf of ESAT.

19. As a result of the decision of the appeal by the office of Commissioner of Valuation, ESAT appealed to the respondent, the Valuation Tribunal. That appeal was governed by the provisions of s. 3(5) of the 1988 Act. On or about the 2nd May 2001, pursuant to the provisions of s. 3(5) of the 1988 Act, the applicant was provided with notices of appeal in respect of the two hereditaments the subject of these proceedings. On the 2nd May 2002, the Valuation Act 2001, (the 2001 Act) came into force repealing the 1988 Act in its entirety. Section 57(7) of the 2001 Act provides as follows:-

> "An appeal made to the Tribunal under, and in accordance with, section 3(5) of the Act of 1988, being an appeal which has not been heard by the Tribunal under that Act before the commencement of this Act or which has been so heard but in respect of which a determination has not been made by the Tribunal before such commencement, shall be deemed to be an appeal made to the Tribunal under section 34."

20. Section 57(8) of the 2001 Act Provides:-

> "Subject to subsection (9), so much of this Act (other than section 35) as is appropriate, having regard to the steps that may already have been taken under the Act of 1988, in relation to such an appeal, shall apply to the appeal with any necessary modifications."

21. There is no issue between the parties that as and from 2nd May 2002, the appeal was governed by the 2001 Act.

22. The applicant was notified that the appeal was listed for hearing on the 4th November 2002, and it was advised that the absence of a reply by the 21st October 2002, would be taken as an indication that it did not intend to participate in the appeal. The applicant did not appear at the hearing before the Valuation Tribunal and therefore was not in a position to deal with the notification issue. It is contended on behalf of the applicant that s. 36(2) of the 2001 Act, was not complied with in that a précis of evidence submitted by ESAT prior to the appeal was not furnished to the applicant. Had the applicant been served with the précis of evidence it is submitted that it would have been alerted to the fact that ESAT was relying on the notification issue and would have attended. It would be useful at this point to refer briefly to the provisions of s. 36 of the 2001 Act. It provides:-

> "(1) As soon as may be after the receipt by it of an appeal made to it under section 34, the Tribunal shall serve a copy of the appeal on each of the following persons (unless the person is the appellant or an appellant in the matter) namely, the occupier of the property, the subject of the appeal, the rating authority in whose area that property is situated and the Commissioner.
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> (2) All other documentation and information in writing submitted in connection with the appeal shall be served by the Tribunal on each of the following persons (other than in a case where the person has submitted the particular documentation or information), namely:
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> (a) the Commissioner (who shall be the respondent in, and be entitled to be heard, and adduce evidence at, the hearing of the appeal), and
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> (b) the occupier of the property, the subject of the appeal, and any other person who appears to the Tribunal will be directly affected by its decision on the appeal (and the said occupier and each such person shall be entitled to be heard, and adduce evidence at, the hearing of the appeal)."

23. The appeal was heard on the 4th July 2003, and on the previous day the Valuation Office was notified that the appellants (ESAT) were not in a position to proceed on quantum issues, but wished to proceed on the notification issue. A précis had been supplied some twelve days earlier to the valuation office and it was apparent from that that ESAT was pursuing the issue of notification under s. 3(4)(a) of the 1988 Act.

24. The key issue raised on behalf of the applicant herein was whether the respondent was obliged under s. 36(2) of the 2001 Act, to furnish the précis to the applicant.

25. Before I deal with the legal submissions advanced to the court by the parties herein, I think it would be useful to deal with the information on affidavit from the various parties as to the précis referred to by Mr. Cotter in his affidavit. The précis was not exhibited by Mr. Cotter, a point made by Ann Creaven, the Registrar of the Valuation Tribunal in her affidavit sworn herein in the 25th July 2005. She does refer to a document submitted on behalf of ESAT headed Jones Lang LaSalle entitled "Valuation History" which contained a list of documents including a letter dated the 4th June 1998, to ESAT, 8 Upper Mount Street, Dublin 2, where it is noted:-

> "ESAT first made aware of the existence of this letter when produced by appeal valuer during consultation in Fry's offices on 7th October 2002. ESAT advise that 8 Upper Mount Street, Dublin 2, was their registered office from 15th October 1993, to 26th September 1995, at which stage these premises were vacated and the registered office transferred to The Malt House, Grand Canal, Dublin 2."

26. This is the document described by Mr. Cotter as the précis. Ms. Creaven made the point in her affidavit that it was not apparent from that document that ESAT "was separately pursuing the issue of notification" as alleged by Val Cotter. She confirmed that the appeals were finally heard and determined on the 4th July 2003, although the written determination was not delivered until the 13th December 2004.

27. It is also interesting to note that in her affidavit Ms. Creaven points out that since 1988, some four thousand appeals had been commenced at the Valuation Tribunal. Rating authorities rarely become involved in appeals in the Valuation Tribunals. Indeed the number in which rating authorities have been involved is fewer than twenty. Ms O'Sullivan in the affidavit sworn by her on behalf of ESAT commented that there was nothing in the précis touching on the issues of the ground of appeal in relation to notification which would have added to the knowledge which Cork County Council already had in relation to that issue. She went on to add:-

> "The receipt of such précis of evidence would have made no difference whatsoever to the disposition of Cork County Council and it may be presumed that even if the County Council had received the précis of evidence it would still not have participated (if so entitled) in the appeal to the Valuation Tribunal. In the circumstances I say that the applicant's allegations in not receiving a précis of the evidence are made merely for the purpose of providing some form of colourable basis for seeking to challenge a determination with which the applicant is dissatisfied on the merits."

28. The affidavit of John Colfer of the office of the Commissioner of Valuation commented in regard to the averment of Mr. Cotter to the effect that Cork County Council were required to be furnished with the précis as follows:-

> "There is no statutory obligation imposed on the valuation office by s. 36 of the Valuation Act 2001, or at all to furnish a précis of any document to a rating authority in respect of any valuation appeal made to the rating authority."

29. As a general proposition that may well be the case but the facts and circumstances of a particular case may require a different approach.

30. I think from the background outlined above, certain facts emerge.

> 1. Having considered the various affidavits sworn herein as to the appeal before the second named notice party and in particular those of Mr. Tuite and Mr. Dineen, I am satisfied that the issue of non notification was raised at that hearing. It is clear that Mr. Dineen, mistakenly in my view, took the view that as the applicant had stated in a letter to his predecessor that the Council had complied with the requirement to serve notices under s. 3(4)(a) of the 1988 Act, that it had, in fact done so. Clearly, the Council thought that they had complied with the requirement, but as is now clear, notification was sent to the wrong address.
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> 2. The issue of a notice having been sent to the wrong address did not arise until October 2002, when William Fry, solicitors, first had sight of a copy of the letter dated the 4th June 1998, addressed to ESAT at its former address.
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> 3. The précis did not raise a separate or distinct issue as to the wrong address. The précis in effect contained a probable explanation for why notification was not received.
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> 4. It is apparent from the decision of the respondent herein that before the revision of the hereditaments concerned took place, there was contact with ESAT and the Office of the Commisioner of Valuation in relation to the proposed revisions. During the course of the hearing before the respondent, counsel on behalf of ESAT indicated that ESAT "was making no issue whatsoever that the appellant as a matter of fact engaged in the provision of information to Mr. Conroy prior to the revisions. [Counsel] further said that the appellant was simply saying that the s. 3(4)(a) notice, was not served on it by the rating authority."

Submissions

31. Counsel on behalf of the applicant herein referred to the provisions of s. 36(2) of the 2001 Act, which states:-

> "All other documentation and information in writing submitted in connection with the appeal shall be served by the Tribunal on … any other person who appears to the Tribunal will be directly affected by its decision on the appeal (and the said occupier and each such person shall be entitled to be heard, and adduce evidence at, the hearing of the appeal)."

32. It was argued that this was a mandatory provision of the Act and that the respondent failed to operate the provisions of s. 36(2) of the 2001 Act. It was submitted that in this case the applicant was clearly a party directly affected by the decision of the Tribunal on the appeal. It was pointed out the wording in the section was "shall be served" and it was argued that this was a mandatory requirement and had not been complied with. A number of authorities were quoted in support of this view, particularly *McAnenley v. An Bórd Pleanala* [2002] 2 I.R. 763, a decision of Kelly J. in which the decision in *The State (Elm Developments Limited) v. An Bórd Pleanala* [1981] I.L.R.M. 108 was followed. In the McAnenley decision Kelly J. was dealing with the provisions of s. 6 of the Local Government (Planning and Development) Act 1992, which concerns the submission of documents to the respondent by a planning authority against whose decision an appeal is taken. Section 6 provided as follows:-

> "Where, an appeal is made to the Board the planning authority concerned shall, within a period of fourteen days beginning on the day on which a copy of the appeal is sent to them by the Board, submit to the Board ..."

33. The section goes on to outline the list of documents required to be sent. It was argued before Kelly J. that the provision was to be interpreted as not creating a mandatory obligation but rather a permissive provision. He disagreed with that view and quoted a passage from the judgment of Henchy J. as follows (p. 110):-

> "Whether a provision in a statutory instrument, which in the face of it is obligatory, for example, by the use of the word "shall", shall be treated by the courts as truly mandatory or merely directory, depends on the statutory scheme as a whole and the part played in that scheme by the provision in question. If the requirement which has not been observed may fairly be said to be an integral and indispensable part of the statutory intendment, the courts will hold it to be truly mandatory and will not excuse a departure from it. But if, on the other hand what is apparently a requirement is in essence merely a direction which is not of the substance of the aim and the scheme of the statute, non compliance may be excused."

34. Kelly J. went on to comment at p. 766 of his judgment:-

> "The obligation to submit these documents is placed on the planning authority. The section uses the word shall. The intent of the legislature is that there should be placed before the respondent the documentary material as specified which

was on the planning authority file and was before it when it made its decision …

it is difficult to treat non compliance with an express statutory requirement on a *de minimis* basis. The notification of a decision of a planning authority will in all cases contain the essence of the decision itself. Notwithstanding that, parliament has ordained that both should be provided to the respondent. I cannot disregard the statutory requirement. That is not to say that, notwithstanding non compliance with the provisions of s. 6(c) in an appropriate case *certiorari* might be withheld as a matter of discretion, if that that were the only *lacuna* involved and no injustice would result. But that is not the case here for reasons which I will turn to presently."

35. Relying on the authorities referred to above, it was submitted by counsel on behalf of the applicant that what has happened here is that there is a lacuna in the decision of the respondent. Only one party could have given evidence as to the question of notification or service in accordance with the provisions of s. 3(4)(a) of the 1988 Act. That was the applicant. The information before the Tribunal as to notification was that in June 1998, written notification of the listing for revision had been sent to the appellant at its former address. There was an issue before the respondent as to whether notification equated with service but in the context of the circumstances of this case I am not of the view that this point is of significance. However, it is important to note that in the decision of the respondent it was expressly noted:-

"Mr. Hickey applied for a direction given that there was no evidence from the rating authority and the evidence tendered by the appellant that it had left the building to which notice was addressed three years previously."

36. In its findings the respondent went on to state:-

"In view of the clear failure by the respondent to discharge the onus on him to prove compliance with s. 3(4)(a) of the Valuation Act 1988, the revisions involved in these appeals are invalid."

37. The direction was then granted. Counsel on behalf of the applicant emphasised that the whole problem as can be seen from the decision of the Tribunal was that there was no evidence as to notification and that that was quite simply because the respondent had failed to comply with the provisions of s. 36(2) and had that been complied with, the applicant would have been alerted to the difficulty in relation to notification and would have appeared.

38. It is further submitted that the Valuation Tribunal could have adjourned in circumstances where it was clear that there was no evidence before the Tribunal because of the fact that the rating authority was not before it in order to allow the applicant an opportunity for evidence of notification to be given. On the basis of the failure to adjourn, it was argued that the Tribunal's procedures were not operated fairly. It was pointed out that the Tribunal has the power to direct parties to give evidence and once it appeared there was a lack of evidence on the point of notification it could have adjourned to obtain that evidence. Finally reference was made to the decision in the case of *John Pettitt and Son Limited v. Commissioner of Valuation* (Unreported, High Court, 1st May 2001) which was referred to at length and relied on in its decision by the respondent. It was submitted on behalf of the applicant that the respondent herein incorrectly applied the reasoning in that case to the facts of this case. It was argued that the Tribunal, relying on that decision, had conflated notice and service of a notice with notification. It was submitted that that approach was not correct.

39. Colm MacEochaidh on behalf of the respondent disagreed with the suggestion that the *Pettitt* decision was wrongly applied. He argued that the Valuation Tribunal was bound to follow the decision in the *Pettitt* case. He referred to a passage quoted from the Pettit decision at para. 21 thereof in which Butler J. stated as follows:-

"From these cases the following general principles can be arrived at:

(a) When the issue is in a bona fide way so raised the onus is on and remains on the respondent [Commissioner of Valuation] to prove compliance with s. 3(4)(a)."

40. Accordingly, counsel argued that that was the basis upon which the respondent dealt with ESAT's appeal. He emphasised that the burden of proof in relation to the issue of notification rested on the Commissioner of Valuation as the respondent to the appeal. He made the point that the respondent herein did not decide whether or not there was notification but simply decided that the respondent before it had failed to discharge the burden of proof. As was stated by the respondent in its decision, at para. 19:-

"In view of the clear failure by the respondent to discharge the onus on him to prove compliance with s. 3(4)(a) of the Valuation Act 1988, the revisions involved in these appeals are invalid."

41. He argued that it was not the case of conflating notice with service. It was simply a case that there was a failure to discharge the onus of proof in regard to notification.

42. Counsel went on to deal with the arguments made in respect of the interpretation of s. 36(2) of the 2001 Act. He distinguished between s. 36(1) and s. 36(2). He pointed out that in s. 36(1) the Valuation Tribunal was obliged to serve a copy of the appeal on the rating authority. S. 36(2) required that all other documentation and information in connection with the appeal shall be served on certain specified persons and "any other person who appears to the Tribunal will be directly affected by its decision on the appeal". He argued that that meant that the respondent was only required to comply with s. 36(2) when they had reached the view where it appeared to them that any other person would be directly affected by the decision on appeal. He made the point that it had not been pleaded that the decision not to furnish the documentation was unreasonable. He added that the Tribunal was entitled to decide who should get documentation. He then submitted that the court could only interfere with the exercise of the respondent's powers in exceptional circumstances. He argued that the question as to the service of all other documentation and information provided for in s. 36(2) was not a mechanical operation on the part of the respondent. The respondent was entitled to decide who should get the documentation. It was of significance that s. 36(1) and s. 36(2) created categories of mandatory recipients of the documents identified by the two subsections. The rating authority was expressly referred to in s. 36(1) as a mandatory recipient of the documentation provided for in 36(1) but only the Commissioner of Valuation and the occupier are expressly identified as mandatory recipients in respect of s. 36(2) documentation. In other words there was no obligation on the respondent in respect of "other documentation and information" towards a rating authority. A core submission in respect of this issue was that the purpose of s. 36(2) is to ensure that the respondent conduct itself in a manner which does not infringe upon the rights of any person who may be effected by its decision. He argued that the rights of the rating authority are fully secured by the provisions of s. 36(1).

43. Counsel also made the point that it was difficult to see from the case made by the applicant herein what difference the précis would have made to the position of the applicant herein had it been furnished to the applicant. He noted that in the findings of the respondent it was stated:-

> "The appellant had adequately and properly pleaded in the Notices of Appeal to this Tribunal and the Notices of Appeal in relation to the first appeals, the alleged failure of the rating authority to notify it of the listings for revision the provisions for notification being contained in s. 3(4)(a) of the Valuation Act 1988.
>
> The notices of appeal to this Tribunal in pleading the issue referred to at Paragraph 13 hereof, contained a statement of the specific grounds for these appeals as provided for in s. 3(5)(b) of the Valuation Act 1988."

44. Counsel pointed out that that finding of the Tribunal is not sought to be set aside.

45. Finally counsel argued that it was factually incorrect for the applicant to say that it was only on viewing the précis that they realised that ESAT was pursuing the procedural point only. All that is contained therein is an indication of some of the evidence that would be relied on in regard to the non notification point.

46. Counsel also dealt briefly with the "fair procedures" argument raised by Mr. Collins on behalf of the applicant herein. He was critical of the argument that there was a breach of fair procedures in not hearing the applicant herein and not adjourning the hearing before the tribunal to permit evidence to be heard from or on behalf of the applicant. He also criticised the submission to the effect that the *Pettitt* case referred to above was incorrectly decided or applied because in the instant case ESAT actually participated in the revisions which led to the appeal. He disagreed with the suggestion that these points were covered by para. 5 of the Statement of Grounds and pointed out the decision of the respondent was not challenged on the basis of any form of unreasonableness in the operation of it's procedures..

47. Frank Callanan S.C. appeared on behalf of ESAT. He also looked closely at the provisions of s. 36 and contrasted the provisions of s. 36(1) and s. 36(2). In effect, he said that the applicant is now attempting to resile from its decision not to participate in the hearing before the respondent. He pointed out that the applicant herein had, in accordance with the provisions of s. 36(1) of the 2001 Act, been served with a copy of the appeals in question. The applicant was written to by the respondent by letter dated 24th July 2002 notifying the applicant of the place, time and date of the hearing of the appeals. The letter went on:-

> "I am to ask you to let me have a written notice of your intention in relation to the above appeal, stating:
>
> 1. whether you intend to appear at the hearing of the appeal;
>
> 2. the ground on which you intend to rely"
>
> If no reply is received from you by 21st October 2002, this will be taken as indicating that you do not intend to appear or to take any part in the appeal."

48. Mr. Callanan submitted that it was axiomatic that the rating authority was a party directly affected by every single decision. However, he submitted that the words "any other person" in s. 36 (2) are plainly not intended to include the rating authority but to allow the Valuation Tribunal to identify and serve with relevant documentation and information parties other than the rating authority and the Commissioner of Valuation who might be affected by a decision. Any other interpretation would require the Valuation Tribunal to serve the documentation and information on the rating authority in every single case before it. He submitted that it was difficult to see how the applicant could argue that having seen the notices of appeal they did not consider that the point in relation to s. 3(4)(a) of the 1988 Act, would not be raised or relied on by ESAT.

49. Mr. Callanan also made the point that it was open to the applicant in response to the letter of the 24th July, to say that they understood the point in respect of notification was not raised at the first appeal but if it had been raised, they wished to be heard. They did not do so but sought to rely on the Commissioner of Valuation to represent them.

50. He suggested that the applicant in criticising the application of the *Pettitt* decision to the facts of this case was effectively attempting to go outside the grounds contained in the statement of grounds herein. He argued that the applicant is now suggesting that the substantive determination of the respondent is erroneous and bad in law given that ESAT was involved in the revision process notwithstanding the apparent non-notification. He pointed out that grounds 1 to 5 in the statement of grounds relate to the failure to furnish documentation including the précis. The other points contained in paras. 6, 7 and 8 of the statement of grounds relate to other issues and there is no challenge anywhere to the decision in the *Pettitt* case. Mr. Callanan referred expressly to the decision of the High Court in the *Pettitt* case which was an appeal by way of case stated. One of the questions in that case was as follows:-

> "In the circumstances of this case was the Tribunal entitled to conclude that there was a failure to comply with the provisions of s. 3(4)(a) of the 1988 Act, in relation to the failure of the rating authority to notify the appellant of the application for revision of Lot 74 by the Valuation Office in 1994?"

51. That question was answered by Butler J. at p. 15 of his judgment having referred to the provisions of s. 3(4)(a)(i) of the Act as follows:-

> "By letter dated the 11th August 1992, the appellant company received notification of the 1992 revision. The description of the property in that letter was by reference to Lot No. 74. No notification was given in relation to the 1994 revision. The use of the word "shall" as opposed to "may" indicate that the notification in question is mandatory. I am satisfied that the Tribunal was entitled to conclude that there was a failure to comply with the provisions of the said subsection."

52. Mr. Callanan argued that by referring to the fact that ESAT had participated in the revisions the applicant was in effect asking this court to reconsider the decision in the *Pettitt* case, but he reiterated the point that that was not one of the grounds set forth in the statement of grounds herein.

53. He further submitted that the Tribunal in looking at the submissions made as to the distinction between notification and service was careful in the way in which it approached that issue.

54. He then dealt with the issue that the appeal by ESAT in respect of notification was a new argument as seems to be suggested in the affidavits. He pointed out that all that was known to Mr. Tuite at the first appeal was that they had not been notified. It was only subsequently that it was realised that the letter of notification was sent to the former address of ESAT.

55. He dealt briefly with the fair procedures point raised, on behalf of the applicant herein. He submitted that that aspect of the matter could only be considered in the light of para. 5 of the statement of grounds herein. He argued that having regard to the terms of para. 5 of the statement of grounds, it does not in effect go beyond the argument based on s. 36(2) of the 2001 Act.

56. Finally counsel on behalf of the Commissioner of Valuation, Mr. Conway also looked at the manner in which s. 36 should be construed. He accepted that it was axiomatic that the rating authority would be affected by any decision appealed to the Commissioner of Valuation and he submitted that therefore it must get all other documentation submitted in respect of an appeal. He argued that that was the plain meaning of s. 36. In support of his contention he relied on the decision in the case of *D.B. v. Minister for Health* [2003] 3 I.R. 12 in which it was stated at p. 21 of the judgment 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 Blayney J. in *Howard V. Commissioners of Public Works* [1994] 1 I.R. 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 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."

57. He said that it was an absurdity to suggest that the rating authority had to be expressly mentioned in s. 36(2). There was no logical basis for the argument that the rating authority should be ignored simply because they were not mentioned in subsection 2. Accordingly, it was his view that the précis should have been forwarded to the rating authority. Had that been done, then it was a matter for the rating authority to decide whether it wished to be heard. He submitted that the requirement under s. 36(2) was as near as may be a mechanical operation. It was not a question of the tribunal sitting down and deciding in any case whether the rating authority would be directly affected. Otherwise, he made the point that the rating authority is disadvantaged compared to any other person notified under s. 36(2).

58. Counsel on behalf of the applicant responded to the arguments made by the other parties. He dealt with an argument raised by Mr. MacEochaidh as to the lateness of the application for judicial review. Mr. MacEochaidh had submitted that effectively the application for judicial review had been made when the decision was announced but before the reasons had been given. This particular point was not pleaded. I am satisfied that it was not feasible or reasonable to expect that judicial review proceedings would be brought, before the applicant was aware of the reasons for the decision of the respondent. In relation to the issue of fair procedures, even if the submissions in relation to s. 36 made by the applicant were not accepted, he argued that the Tribunal still had a duty to adjourn the matter even if no application had been made to it by the Commissioner of Valuation as respondent. He referred to the decision of the High Court in the case of *P.S. v. Residential Address Board*, unrep. 3 November 2006, judgment of Gilligan J. The judgment in that case related to the provisions of the Residential Institutions Redress Act 2002, and in particular the provisions of s. 10(6) of that Act. This related to the failure of a psychiatrist to produce clinical notes at the hearing of an application before the Redress Board. Section 10(6) provided for the making of a request for the production of such clinical notes. Section 10(6) provides:-

> "For the purposes of establishing the matters specified in paragraph (a) to (d) of subsection (4), the Board may on its own behalf or at the request of an applicant, request, by notice in writing, any person to produce to the Board or to the applicant any document in his or her possession, custody or control which relates to such matters."

59. The Board in that case came to the conclusion that the information contained in the notes was relevant and that by not bringing the notes the information was not available to the Board and that accordingly, the doctor concerned was a most unprofessional witness and consequently the Board found that he was an unreliable witness. Gilligan J. at p. 8 of his judgment stated as follows:-

> "I take the view that fair procedures demand that if such weight was going to be attached to the medical/clinical notes and such a significant inference drawn from their non production, the applicant and Dr. C should have been given the opportunity to produce the medical/clinical notes. Alternatively the Board should have exercised its powers pursuant to s. 10(6) of the Act to call for the production of the notes against the particular background in this case where at all times it was clear and made known to the respondent that the applicant had not disclosed the medical/clinical notes (other than as set out in the statement of abuse) and they were not being relied on.
>
> I further take the view that if such significance was going to be attached to the notes that such an indication should have been given to the applicant and her legal advisors to enable them to deal with this aspect, for example, possibly by way of an explanation for the non production of the medical/clinical notes."

60. Based on that, counsel for the applicant argued that the Valuation Tribunal when it reached the point that it was going to consider the granting of a direction on the basis of a non notification and accepting that there was no evidence before the Tribunal of notification should have adjourned the hearing before it even if no application was made to that effect, in order to give an opportunity to the applicant to be heard on this point. The respondent dealt with the matter without calling for the production of evidence.

Conclusions

61. The first point to be considered is the question as to whether or not the provisions of s. 36(2) of the 2001 Act, required that the applicant herein be served with a précis of the evidence as submitted on behalf of the applicant. The passage referred to above from the judgement of Denham J. in the case of *D.B. v. Minister for Health* is of assistance in considering the provisions of s. 36(2). In construing s. 36(2) I think it is impossible to do so without having regard to s. 36 as a whole. Section 36(1) expressly puts on notice the rating authority of an appeal by serving a copy of the appeal on the rating authority. Section 36(2)(b) provides for the service of all other documentation and information in writing submitted in connection with the appeal "on the occupier of the property, the subject of the appeal and any other person who appears to the Tribunal will be directly effected by its decision on the appeal".

62. In this case the applicant was duly served with the appeal. It was plain from the appeal that the issue of notification was being relied on by ESAT. It is undoubtedly the case that the applicant was notified of the listing of the appeal for hearing and was invited to appear and informed that if it did not respond by a given date it would be taken as an indication that the rating authority applicant did not intend to appear. Various counsel in dealing with the provisions of s. 36(2)(b) made the comment that it was axiomatic that the rating authority is a person directly effected by the decision on the appeal, but the point was made on behalf of the respondent and ESAT that had it been intended to include the rating authority as one of the parties upon whom documentation or information should be served by the Tribunal the section would have referred expressly to the rating authority as was done in s. 36(1).

63. In effect the argument made was that as the rating authority was expressly referred to in s. 36(1), the absence of a reference to

the rating authority in s. 36(2)(b) meant that it was not intended to include the rating authority as coming within the definition of any other person. Rather it was contended that it was intended that parties other than the rating authority and the Commissioner of Valuation who might be affected by the decision were to be served with relevant documentation and information. It seems to me that that is an over simplistic interpretation of s. 36(2)(b). It is indeed axiomatic that the rating authority is a party directly affected. In the course of submissions one of the arguments made against the applicant was that if the applicant's submissions in respect of the interpretation of s. 36(2)(b) were correct, it would follow that the Tribunal would have to engage in a mechanical operation of automatically sending all documentation and information to the rating authority in every case. I do not accept that contention. The wording of s. 36(2)(b) expressly states:

> "Any other person who appears to the Tribunal will be directly affected by its decision on the appeal."

64. It seems to me that those words infer that the Tribunal is not at all engaged in a mechanical operation but rather has to consider actively whether or not to serve documentation or information on any person affected. It was contended on behalf of the respondent and ESAT that had the précis been served on the applicant herein that the information contained in the précis would not have been such as to have sufficiently informed the decision of the rating authority as to whether it should or should not appear before the Tribunal. I disagree. The issue is whether or not the documentation should have been served. In my view, it should have been served. It is clear that it was only with service of the précis that the possible explanation for non-notification became clear. Had it been served, it would then have been open to the applicant to reconsider the issue as to whether or not it wished to appear. It may or may not have been able to deal with the issue of notification. It was denied the opportunity to try to deal with that issue. I realise that the applicant had always relied on the notification sent to ESAT by the letter of June 1998 sent to the former address of ESAT but had the applicant been aware of the fact that the letter had been sent to a previous address of ESAT, it may have been possible to show that the letter had nonetheless reached ESAT. One can only speculate on this but the point is that the applicant may have reconsidered the decision as to participation in the appeals before the respondent had they been furnished with the précis.

65. In the course of argument, it was suggested that the interpretation of s. 36(2)(b) of the 2001 Act contended for by the applicant would involve a mechanical operation on the part of the respondent in sending every document or piece of information to the rating authority as a party directly affected by every decision. I do not think that this is so. The issue in the appeals herein was non-notification. The précis contained a possible explanation for that. In my view, it would be readily apparent to anyone considering the provisions of s. 36(2)(b) of the 2001 Act that the rating authority should have been furnished with the précis. The respondent was not required to engage in a mechanical operation. On the contrary, it was required to engage with the information and documentation submitted and to consider if it was required to serve that information and documentation to "any other person". It does not appear that the respondent in this case ever considered the issue.

66. Given the views that I have expressed in respect of s. 36(2)(b) of the 2001 Act, it does not seem to me that it is necessary to consider the issue of fair procedures raised by the applicant.

67. I want to deal very briefly with the point that was raised by the applicant in respect of the provisions of s. 37(2) of the 2001 Act. It provides that the Tribunal shall make a decision on an appeal made to it under s. 34 within six months from the date of its having received the appeal. As will be recalled the appeal in this case started before the commencement of the 2001 Act. The 2001 Act, contains transitional provisions. It was argued on behalf of the applicant that the decision of the respondent should be struck down on the basis that its decision was given more than six months after the date to its having received the appeal. It was argued on behalf of the respondent and on behalf of ESAT that it could not have been the intention of the legislature to retrospectively apply a time limit on the Tribunal for the giving of its decisions. At the time the respondent received the appeal there was no requirement on it to announce its decisions within six months of the date of receipt. It was argued that any other interpretation would lead to administrative absurdity and chaos. I have to say that I accept the arguments of Mr. MacEochaidh on this particular point. It seems to me that in this regard the provisions of s. 37(2) are directory rather than mandatory. One only has to consider what would happen to appeals if a decision was not furnished within six months. Does that mean that all such appeals are automatically invalid or liable to be struck down? That cannot be the purpose of the provision. Rather it seems to me that the legislature was setting a time limit within such decisions should be furnished and providing some certainty to parties as to when they are entitled to require or compel the Valuation Tribunal to furnish a decision. Accordingly, I reject the argument of the applicant in this regard.

68. Having reached the decision that the applicant should have been furnished with the précis, the question arises as to whether having regard to all the circumstances of the case, the court should exercise its discretion to grant the relief sought herein. On balance and having considered all of the facts and circumstances of this case I can see no basis on which the court should not exercise its discretion in favour of the applicant. I accept that there is no evidence before me to show that the applicant did, in fact, notify ESAT. It is important to remember the decision of the respondent herein:-

> "In view of the clear failure by the respondent to discharge the onus on him to prove compliance with s. 3(4)(a) of the Valuation Act 1988, the revisions involved in these appeals are invalid."

69. It is also clear that there was no evidence before the respondent. However, I think it would be wrong of me to conclude that the applicant herein could not, if it chose to appear, deal with the issue.

70. I will hear the parties on the appropriate orders to be made in those circumstances.