THE HIGH COURT

JUDICIAL REVIEW

2017 No. 643 J.R.

BETWEEN

THE COMMISSIONER OF VALUATION

APPLICANT

AND

THE VALUATION TRIBUNAL

RESPONDENT

MINISTER FOR COMMUNICATION ENERGY AND NATURAL RESOURCES

E-NASC ÉIREANN TEORANTA

PLANNET 21 COMMUNICATIONS LTD

NOTICE PARTIES

JUDGMENT of Mr Justice Garrett Simons delivered on 15 March 2019.

INTRODUCTION

1. This supplemental judgment addresses the precise form of orders to be made consequential to the principal judgment in these proceedings, *Commissioner of Valuation v. Valuation Tribunal* [2019] IEHC 23. More specifically, this judgment addresses (i) the form of remittal to the Valuation Tribunal; and (ii) liability for legal costs.

2. To put these matters in context, it is necessary to rehearse briefly the circumstances in which the principal judgment came to be delivered. These proceedings take the form of judicial review proceedings directed to a determination made by the Valuation Tribunal on 26 June 2017. The form of the proceedings is unusual in that most challenges to a determination of the Valuation Tribunal come before the High Court by way of the case stated procedure under section 39 of the Valuation Act 2001. Although named as the sole respondent, the Valuation Tribunal did not participate in the judicial review proceedings. It was a matter, therefore, for the notice parties to decide whether they wished to stand over the determination by acting as *legitimus contradictor* to the application for judicial review. In the event, all three notice parties chose to oppose the application for judicial review. The application was fully contested at a three-day hearing before me in December 2018.

3. It should be explained that the notice parties had all brought statutory appeals to the Valuation Tribunal in respect of certain decisions made by the Commissioner of Valuation. The appeals concerned the rateability of certain infrastructure used for the purposes of the provision of broadband capacity. More specifically, the appeals centred on the question of whether metropolitan area fibre optic networks for broadband communication (referred to as "metropolitan area networks" or "MANs") are subject to a requirement to pay rates. The MANs infrastructure was constructed by the State in circumstances where there was a concern that the private sector was not providing such infrastructure quickly enough. The decisions under appeal implied that a distinction could be drawn for rating purposes between (i) the occupation of individual fibre optic cables, and (ii) the occupation of the balance of the infrastructure.

4. The status of the various parties should also be explained as it is relevant to the arguments in respect of costs. The Commissioner of Valuation is the statutory authority charged with the function of carrying out the valuation of property for the purposes of commercial rates. The first-named notice party is the Minister for Communications, Energy and Natural Resources ("*the Minister*"). The Minister is the owner of the MANs infrastructure, and had been found by an earlier determination of the Valuation Tribunal of 25 October 2007 to be in exclusive or paramount occupation of the MANs infrastructure for rating purposes. More generally, the Minister asserts a role in advancing the public interest in ensuring that comprehensive broadband services are provided, and maintains the position that a requirement to pay rates would have negative implications for the viability of such services.

5. The second-named notice party, ENET, is the concessionaire (or "management service entity") which manages the infrastructure on behalf of the State pursuant to a concession agreement. ENET has entered into agreements to allow service providers, including the third-named notice party, PlanNet 21 Communications Ltd. ("*PlanNet 21*"), to use the infrastructure. PlanNet 21 had been served with a proposed valuation certificate indicating that its alleged *occupation* of part of the MANs infrastructure constituted rateable occupation. PlanNet 21 brought an appeal against this decision. ENET also brought an appeal as a person having an interest in the land or premises.

6. It should be recorded that both the Minister and the two private companies have a genuinely held sense of grievance against the Commissioner of Valuation. All three notice parties take the view that the Commissioner of Valuation—having agreed to a test case in 2007 as to the rateability of the broadband infrastructure the subject-matter of these proceedings—was not entitled to issue certificates of valuation in 2014.

7. The notice parties' appeals were heard in September and November 2016, and the Valuation Tribunal made a determination on 26 June 2017 allowing the appeals. This determination was then challenged by the Commissioner of Valuation in these judicial review proceedings.

8. The gravamen of the application for judicial review is that the Valuation Tribunal had acted unlawfully in the manner in which it purported to decide the appeals. In particular, it was alleged that the approach adopted by the Valuation Tribunal, whereby it purported to determine the appeals by reference to a preliminary issue, was *ultra vires*.

9. As appears from the principal judgment, the application for judicial review was successful. See paragraphs [109] to [112] as follows.

> "CONCLUSION

> 109. The content of its Determination of 26 June 2017 indicates that the tribunal either (i) failed to address itself to the issues actually before it, or (ii) failed to comply with its statutory duty to set forth reasons for its determinations. The tribunal also purported to determine the merits of the appeals without affording fair procedures to the Commissioner for Valuation, and acted in breach of his legitimate expectations as to the procedure to be adopted. In particular, the Commissioner had been entitled to assume that—unless the preliminary issues were decided against him—there would be a second subsequent hearing at which the substantive issues in the appeals would be heard and determined on the basis of evidence.
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> 110. In all the circumstances, the Commissioner is entitled to succeed in his application for judicial review.
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> PROPOSED ORDERS
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> 111. I propose to make (i) an order of certiorari setting aside the Determination of 26 June 2017 in its entirety, and (ii) an order pursuant to Order 84, rule 27(4) of the Rules of the Superior Courts remitting all of the appeals to the Valuation Tribunal for reconsideration in the light of the findings of this court. I also direct that—unless it is not possible to do so because there are no alternates available—the appeals should be heard by a differently constituted division of the tribunal. This is because the three members involved in the impugned Determination have, in effect, purported to decide the substantive issue in the appeals without affording fair procedures to the Commissioner. It would be preferable, therefore, were the appeals to be heard by members who have not previously adjudicated on these matters.
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> 112. I will hear counsel as to the precise form of the order in this regard. In particular, I invite submissions on whether the order of remittal should include a direction that the appeals be heard in full, i.e. not on the basis of the trial of a preliminary issue."

10. As also appears from the judgment, the precise form of order was something upon which the parties were invited to make submissions. To this end, a short hearing took place before me on 28 February 2019.

(1) FORM OF REMITTAL

11. As appears from the principal judgment, in addition to setting aside the impugned decision by way of *certiorari*, it was proposed to remit the matter to the Valuation Tribunal. Further, it was proposed that, unless there were logistical difficulties in doing so, the matter should be remitted to a differently constituted division of the Valuation Tribunal. There was broad agreement between the parties at the hearing on 28 February 2019 that the order for remittal should direct that the matter is to be determined by a differently constituted division of the Valuation Tribunal. As it happens, it seems that the membership of the Valuation Tribunal has changed in any event. Accordingly, the matter could not have been remitted to the same division even if the court or the parties wished it to be.

12. The parties were in disagreement, however, as to whether the order for remittal should include a direction that the appeals be heard in full, i.e. not on the basis of the trial of a preliminary issue. To put this in context, it should be recalled that much of the difficulty with the impugned determination arose from the fact that the Valuation Tribunal had purported to deal with the appeals before it by reference to a preliminary issue. For this reason, I had invited submissions as to whether a direction along the lines indicated above should be included as part of the order for remittal.

13. Counsel on behalf of the Commissioner of Valuation, Mr David Dodd, BL, submitted that the order for remittal should include such a direction. It was suggested that previous experience indicated that the matter could not properly be dealt with by way of the trial of a preliminary issue.

14. Counsel on behalf of the Minister, Mr James Devlin, SC, advanced both a practical and a principled objection to this approach. First, it was suggested that if the hearing could not be divided into a hearing on liability, with a subsequent hearing on quantum (if necessary), then the omnibus hearing would require a six-day slot before the Valuation Tribunal. It was suggested that it would be difficult to obtain such a lengthy slot given the part-time nature of membership of the tribunal. Secondly, it was submitted that the court should respect the discretion of the Valuation Tribunal to determine its own procedures and to case manage appeals.

15. Mr Devlin, SC, advocated for an order for remittal *simpliciter*, and suggested that any order should faithfully follow the language of Order 84, rule 27(4).

> "(4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court."

16. On behalf of the second- and third-named notice parties, Mr Paul Gardiner, SC, adopted a similar approach. Counsel submitted that the court should not assume that the Valuation Tribunal would act unlawfully, and further submitted that the principal judgment had reached no finding that the decision to deal with the matter by way of preliminary hearing was invalid. Rather, the principal judgment was directed solely to the question as to how that hearing took place and the ultimate determination made pursuant thereto. It was submitted that the court had found that both the hearing and the reasoning of the Valuation Tribunal was defective.

17. The submissions by Mr Devlin, SC, and Mr Gardiner, SC, are well made. The principal judgment makes no finding in respect of the Valuation Tribunal's jurisdiction to determine matters by way of a preliminary issue or to conduct a modular hearing. In the absence of such a finding as to jurisdiction, it would be inappropriate for this court to direct that the matter not proceed by way of a preliminary hearing.

18. In the course of his reply, Mr Dodd, BL, raised the concern that the omission to include, as part of the order for remittal, a direction that the matter not proceed by way of the trial of a preliminary issue might be misinterpreted as indicating an endorsement on the part of the court that the trial of a preliminary issue is the appropriate way to proceed. More specifically, it was suggested that having expressly raised in the principal judgment the possibility of including such a direction, some play would be made of the subsequent *omission* of a direction.

19. I am obviously anxious not to do anything which might cause further delay or confusion in the resolution of the appeals. For this reason, I am dealing with these matters by way of a written judgment rather than by an *ex tempore* ruling which would be more usual in the case of consequential orders. This supplemental judgment will be available to the Valuation Tribunal.

20. Accordingly, for the avoidance of any doubt, it should be noted that the omission by this court to include an express direction requiring that the matter not proceed by way of the trial of a preliminary issue should not be understood as an endorsement or recommendation that this is, in fact, the appropriate way to proceed. Nor should it be interpreted as involving an implicit finding that the Valuation Tribunal has statutory jurisdiction to direct the trial of a preliminary issue. Rather, for the reasons outlined above, this court is refraining from including such a direction in circumstances where no finding was made in the principal judgment as to the jurisdiction or propriety of proceeding by way of a preliminary hearing and/or a modular trial. This court has reached no concluded view on these issues. It is, therefore, open in principle to any of the parties to raise an objection to these matters before the Valuation Tribunal.

(2) LEGAL COSTS

21. The Commissioner of Valuation has formally applied for an order directing that the three notice parties should pay his costs of the proceedings, such costs to be taxed in default of agreement. This application is resisted by the Minister on the basis that the Valuation Tribunal, the Commissioner of Valuation and the Minister are all State bodies. It is said that it is not in the public interest that there should be an order for costs where two State bodies are arguing about what a third State body, i.e. the Valuation Tribunal, did.

22. The application for costs is resisted by the second- and third- named notice parties on the basis that they are, in effect, innocent bystanders in a dispute between two State bodies.

23. The general rule under Order 99 of the Rules of the Superior Courts is that costs follow the event, i.e. the losing party or parties are responsible for paying the winning side's costs, such costs to be taxed in default of agreement.

24. Of course, a court retains *discretion* to make a different order in respect of costs. This is expressly provided for under Order 99, rule 1 of the Rules of the Superior Courts (as amended) as follows.

> "(1) The costs of and incidental to every proceeding in the Superior Courts shall be in the discretion of those Courts respectively.
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> […]
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> (4) Subject to sub-rule (4A), the costs of every issue of fact or law raised upon a claim or counterclaim shall, *unless otherwise ordered*,* follow the event."
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> *Italics not in original.

25. The judgment of the Supreme Court in *Dunne v. Minister for Environment (No. 2)* [2008] 2 I.R. 775, [27] emphasised that where a court departs from the normal rule as to costs, it is not completely at large but must do so on a reasoned basis, indicating the factors which, in the circumstances of the case, warrant such a departure.

26. The Minister's submission that it is not in the public interest to award costs against one State body in favour of another State body has a superficial attractiveness. Given that both the Commissioner of Valuation and the Minister are emanations of the State, there is a certain artificiality in apportioning costs one as against the other. The costs are ultimately coming from the same source, i.e., the public purse.

27. However, I have concluded that this is not a case where the general rule that costs follow the event should be disapplied, for the following reasons.

28. First, were the court to accede to the Minister's argument it would, in effect, be creating a new costs rule over and above those already provided for under Order 99. The rationale underlying the Minister's argument applies to *any* proceedings involving a dispute between two emanations of the State. If pursued to its logical conclusion, the argument indicates that there is a category of cases to which the normal costs rules do not apply, namely those cases involving two emanations of the State.

29. However, the Supreme Court in *Dunne v. Minister for Environment (No. 2)* [2008] 2 I.R. 775 held that the carving out of a predetermined category of cases to which the normal costs rules do not apply would require legislation. See paragraph [26] of the judgment.

> "The rule of law that costs normally follow the event, that the successful party to proceedings should not have to pay the costs of those proceedings which should be borne by the unsuccessful party, has an obvious equitable basis. As a counterpoint to that general rule of law, the court has a discretionary jurisdiction to vary or depart from that rule of law if, in the special circumstances of a case, the interests of justice require that it should do so. There is no predetermined category of cases which fall outside the full ambit of that jurisdiction. If there were to be a specific category of cases to which the general rule of law on costs did not apply that would be a matter for legislation since it is not for the courts to establish a cohesive code according to which costs would always be imposed on certain successful defendants for the benefit of certain unsuccessful plaintiffs."

30. Although the judgment in *Dunne* arose in the context of an argument that public interest litigation represented a category of litigation to which special costs applied, the principle that this is a matter for legislation applies equally to the Minister's argument in the present case.

31. The second reason for rejecting the Minister's argument is that it overlooks the fact that the making of an order for costs is not simply intended to operate as an indemnity whereby one party has to reimburse the other side's legal costs. Costs orders serve a related objective of ensuring discipline in legal proceedings. See *Bank of Ireland v. Farrell* [2012] IESC 42; [2013] 2 I.L.R.M. 183, [14]

> "Furthermore the courts have become more prepared, in recent times, not least because of changes in the Rules of Court, to look at individual elements of the conduct of proceedings to ascertain whether parties have acted in such a way as has, irrespective of the ultimate outcome of the case, led to additional and unnecessary costs being incurred. Apart from the undoubted justice of that approach same has the added advantage of discouraging parties from bringing unnecessary and unmeritorious applications, resisting appropriate applications or adding unnecessarily and inappropriately to the complexity (and thus the cost) of proceedings by adding a multiplicity of claims or a multiplicity of defences.
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> That analysis is designed to show that the power of the court to award costs is a very important aspect of the armoury

> of the courts designed to ensure that parties are treated justly and that the court process is not abused. Indeed, in that context, it is worthy of some note that the court's normal response to a procedural failure is to see, first, whether it is possible to remedy that procedural failure by an appropriate award of costs. If it were not possible to order costs as a means of dealing with a procedural failure then the court might, in balancing any rights involved, be constrained to take some more significant action which might affect the result of the case as a whole. This would be a highly undesirable development but one which would come into much greater focus in the event that the court was unable to deal with procedural failure on the basis of remedying the wrong arising from that failure (where possible and adequate as a remedy) by an award of costs."

32. Whereas these passages are concerned with what might be described as the costs of interlocutory applications, it seems reasonable to infer that similar sentiments apply to the substantive costs of proceedings. If different costs rules were to apply to litigation between two State bodies, then this disciplining effect would be lost. The parties to such litigation would instead have a free run on costs. This seems undesirable. The pursuit of litigation has consequences which go beyond the incurring of legal costs by the parties. Contested litigation can result in delay to public authorities in the exercise of their statutory functions. On the facts of the present case, for example, a period of some eighteen months has elapsed between the date of the institution of the proceedings on 31 July 2017 and the delivery of the principal judgment on 25 January 2019. Moreover, litigation expends limited judicial resources.

33. Given all of these considerations, it is in the public interest that State bodies should, *where possible*, seek to resolve their differences without the need for hard fought litigation. If and insofar as the normal costs rule, i.e. that costs follow the event, might provide even a small incentive to State bodies to adopt a reasonable approach in deciding whether to pursue or defend litigation, then it should not be displaced.

34. None of this is intended as a criticism of the approach taken by the Minister to this litigation. The Minister, as he was perfectly entitled to do, chose to stand over the determination of the Valuation Tribunal, and to fully contest the judicial review proceedings. For the reasons set out in the principal judgment, I concluded that the decision-making was invalid. Assuming that my finding is not set aside on appeal, then the logic of the principal judgment is that the Commissioner of Valuation was correct to bring the judicial review proceedings. By choosing to fully contest the proceedings, the Minister put the Commissioner of Valuation to the cost of a three-day hearing.

35. I reiterate that none of this is intended as a criticism of the approach taken by the Minister. Rather it is intended to explain why a "bright line" rule, to the effect that the normal costs rule should be disapplied in the case of litigation between State bodies *inter se*, is not desirable. As previously stated, the Minister was perfectly within his rights to oppose the application for judicial review. There were respectable arguments in favour of his position, and these were ably advanced by counsel on his behalf. The point is simply that under the costs regime provided for under Order 99, a party who is unsuccessful in proceedings is generally liable for the costs of the other side. To introduce a different rule, whereby no costs orders would be made in cases involving disputes between State bodies inter se would remove any financial incentive for such parties to compromise proceedings. This would not be in the public interest. In any event, it would require legislative intervention, or, at the very least, an amendment to the Rules of the Superior Courts.

36. I turn now to consider the position of the second- and third-named notice parties. As noted above, they resist the application for costs on the basis that they are, in effect, innocent bystanders in a dispute between two State bodies.

37. One cannot help but have some sympathy for the second- and third-named notices parties in circumstances where the resolution of their appeals has been delayed for several years. (Their appeals were first submitted in September 2014).

38. The fact of the matter remains, however, that the second- and third-named notice parties chose to fully defend the judicial review proceedings. Having done so, they are, in accordance with the well-established case law, potentially liable for the costs of the other side. Mr Dodd, BL, referred me to the relevant passages from *Delany and McGrath on Civil Procedure* (4th edition, Round Hall, Dublin 2018). In particular, counsel referred me to §24 109 which states *inter alia* that if a notice party has participated actively in the proceedings and has been the *legitimus contradictor*, then a court might exercise its discretion to award costs against the respondent and the notice party or against the notice party alone. On the facts of the present case, the respondent, i.e. the Valuation Tribunal, did not participate in the proceedings. Rather the three notices parties (including the Minister) took it upon themselves to act as *legitimus contradictor*. There is no reason to distinguish between the position of the various notice parties: they all sought to fully defend the proceedings.

39. Accordingly, I make an order directing that the three notice parties are to pay the legal costs of the Commissioner of Valuation, such costs to be taxed in default of agreement.

PROPOSED ORDERS

40. In summary, I propose to make the following orders.

> (1). An order of *certiorari* setting aside the determination of the Valuation Tribunal dated 26 June 2017.
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> (2). An order in accordance with Order 84, rule 27(4) remitting the appeals to the Valuation Tribunal with a direction to reconsider those appeals and to reach a decision in accordance with the findings of the High Court judgment of 25 January 2019. The appeals are to be heard by a differently constituted division of the Valuation Tribunal.
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> (3). An order directing that the three notice parties are to pay the legal costs of the Commissioner of Valuation, such costs to be taxed in default of agreement. The costs are to include all reserved costs, and the costs of the written legal submissions. I will place the usual stay on the costs order in the event of an appeal.