THE HIGH COURT
JUDICIAL REVIEW

2017 No. 643 J.R.

BETWEEN

THE COMMISSIONER FOR 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 25 January 2019.

INTRODUCTION

1. These proceedings confirm the truth of the adage that the longest way round is often the shortest way home. The Valuation Tribunal sought to expedite the hearing of a number of appeals before it by purporting to deal with the appeals on a "preliminary basis without the need to go into evidence". This was done in circumstances where the appellants had urged upon the Valuation Tribunal that the decisions under appeal constituted both an abuse of process and an unjustified collateral attack on an earlier determination of the Valuation Tribunal. The appellants relied, in particular, upon the doctrine of *res judicata* and upon the rule in *Henderson v. Henderson*.

2. By adopting the course that it did, the Valuation Tribunal fell into legal error. 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.

3. The consequence of all of this is that the 2017 Determination must be set aside in its entirety, and the appeals remitted for reconsideration by a differently constituted division of the Valuation Tribunal if possible.

4. This will have the unfortunate result that the ultimate resolution of the appeals—which were originally submitted as long ago as September 2014—will be further delayed. However, the imperative of ensuring that a quasi-judicial tribunal, such as the Valuation Tribunal, reaches its determinations in accordance with law leaves the court with no other option.

UNDERLYING DISPUTE

5. The underlying dispute between the parties concerns the rateability of certain infrastructure used for the purposes of the provision of broadband capacity. More specifically, the dispute centres on the question of whether metropolitan area fibre optic networks for broadband communication (referred to as "metropolitan area networks" or "MANs") are subject to the requirement to pay rates. The MANs infrastructure consists of a ring network which in turn consists of ducts (through which sub-ducts pass) and fibre optic cables (which pass through sub-ducts). The 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 infrastructure is managed on behalf of the State by a concessionaire (or "management service entity") pursuant to a concession agreement. (The concessionaire, ENET, is the second-named notice party to these proceedings). ENET, in turn, has entered into agreements to allow service providers, including the third-named notice party, PlanNet 21 Communications Ltd. ("PlanNet 21"), to use the infrastructure.

6. The question of whether the MANs infrastructure was subject to a requirement to pay rates had initially come before the Valuation Tribunal as long ago as 2007. It appears from the terms of the 2007 Determination that the parties thereto regarded it as a "test case". The parties to this 2007 Determination were the Minister for Communications Marine and Natural Resources ("the Minister"), as owner of the MANs infrastructure, and the Commissioner for Valuation ("the Commissioner").

2007 DETERMINATION

7. The Valuation Tribunal determined on 25 October 2007 that the MANs infrastructure was exempt from the payment of rates by virtue of section 15(3) of the Valuation Act 2001. Prior to its amendment under the Local Government Reform Act 2014, this section provided that relevant property directly occupied by the State (including any land or building occupied by inter alia any Department) shall not be rateable.

8. The Valuation Tribunal had concluded that the Minister was in exclusive or paramount occupation of the infrastructure. This was so notwithstanding the existence of the concession agreement with ENET. The Valuation Tribunal noted that the MANs have been designed, funded and constructed by the State; that the State owned the property in question; and that the State retained a very high degree of control over the management, maintenance and operation of the MANs.

> "[...] It is our view that the property in question is occupied by the State for the purposes of Section 15(3) of the Act and any such limited right of or actual occupation by E-Net is subordinate to the paramount occupation for rateable purposes by the State."

9. It is not entirely clear whether the Valuation Tribunal had considered and determined the *separate* question of whether a service provider might be regarded as being in occupation of individual fibre optic cables for the purposes of rating.

10. As noted earlier, the parties to the 2007 proceedings were the Minister and the Commissioner. The concessionaire, E-Net, was not formally a party to the proceedings, still less were the service providers. Indeed, there appears to have been some confusion on the part of the Commissioner at the hearing in September and November 2016 as to whether there had, in fact, been any service providers *in situ* at the time of the 2007 Determination. However, on the penultimate day of the hearing before the Valuation Tribunal (7 November 2016), senior counsel acting on behalf of the Commissioner conceded that there were, in fact, service providers *in situ* in 2007.

11. It is now accepted by all parties that, as a matter of fact, certain service providers were using at least some of the fibre optic cables as of 2007. Accordingly, the legal implications of this use could have been raised in 2007. As explained presently, one of the issues which the Valuation Tribunal was required to consider in 2017 was whether the fact that the Commissioner did not pursue an argument in 2007 to the effect that the service providers were in rateable occupation of individual fibre optic cables precludes him from ever relying on an argument to that effect.

THE 2014 APPEALS

12. Section 19 of the Valuation Act 2001 provides for the making of a valuation order. The Commissioner is then required to appoint an officer to organise and secure the carrying out of a valuation of every relevant property situated in the rating authority area specified in the order, other than (a) any relevant property the subject of an order under section 53, or (b) any relevant property specified in Schedule 4. A valuation order was made for Waterford City Council on 12 December 2011.

13. Notwithstanding the existence of the 2007 Determination, the Commissioner, as part of the revaluation exercise pursuant to section 19 of the Valuation Act 2001, purported to issue proposed valuation certificates in respect of infrastructure within the metropolitan area network in Waterford in or about September 2013. In one instance, the Commissioner had purported to issue separate certificates in respect of the same overall property as follows (No. 2182875 and No. 500421). It seems that PlanNet 21 was treated as being in rateable occupation of fibre optic cables, while the other elements of the MANs infrastructure were treated as being "vacant" notwithstanding that same remained in the ownership of the Minister.

14. These judicial review proceedings concern the treatment of five certificates of valuation: four issued to the Minister designating the relevant property as "vacant", and one issued against PlanNet 21 designating the relevant property as "occupied".

15. The Minister and the second and third named notice parties exercised their various rights of internal appeal against the proposed valuation certificates. Reliance was placed in these appeals on the existence of the 2007 Determination. These internal appeals were unsuccessful.

16. The Minister and the notice parties next submitted individual appeals to the Valuation Tribunal. (ENET's appeal had been lodged on the basis that, as the concessionaire, it had an interest). As explained presently, the six appeals were ultimately all listed for hearing together, commencing in September 2016. The Minister's appeals were to be heard first.

17. Prior to that joint listing, the solicitors acting on behalf of PlanNet 21 and ENET had been seeking to have their clients' two appeals dealt with at the earliest possible date. The appeals had been formally submitted on 4 September 2014. In the covering letter enclosing the appeals, Arthur Cox Solicitors made a request that the Valuation Tribunal fix the earliest possible date for a preliminary hearing as to rateability, with any issues of quantum to be left over.

18. Given the importance of this letter in framing the preliminary issues, it is necessary to set out the key passages of same.

> "We wish to bring a number of matters to the Valuation Tribunal's attention in respect of these appeals at the outset as follows:
>
> > 1. In the previous proceedings before the Valuation Tribunal it was accepted by the COV (and is referred to in the Judgement), that the occupier of the MAN was either the State or our client enet, as concessionaire. It was expressly accepted by the COV and the Valuation Tribunal that operators who license the MAN from enet (such as PlanNet 21) are not in occupation.
> >
> > 2. Furthermore, the Valuation Tribunal held that the State was in occupation of the MANS rather than enet because the rights given to enet by way of its concession were subordinate to the paramount occupation of the State for rating purposes. PlanNet 21 derives its rights from enet as its customer and cannot and does not have any more rights in respect of the MAN than enet. In finding that enet is subordinate to the State for rating purposes then it follows so is PlanNet 21. In that regard, the contractual arrangements between the State and enet have not changed from the time of the 2007 Judgment, and no such change of circumstances has been put forward by the Valuation Office or the COV.
>
> In light of the above, it is our view that the Valuation Certificate should never have issued. Consequent on the unequivocal 2007 Judgement the subject property is not rateable as it is occupied by the State and the issuance of a Valuation Certificate is in breach of section 15(3) of the Act.
>
> The stance adopted by the COV is both an abuse of process and an unjustified collateral attack on an un-appealed decision of the Valuation Tribunal. The COV's actions are causing our clients untoward disruption and cost, and have placed enet's business at significant risk in circumstances where its customers may terminate their MAN services agreements with enet if rates are purported to be levied on them.
>
> In these circumstances we respectfully request that the Valuation Tribunal fix the earliest possible date for a preliminary hearing as to rateability with any issues of quantum to be left over, as is appropriate. We request the consent of the COV to this approach.
>
> Our clients have also placed the COV on notice, and do so again by way of this letter, that they will seek to recover their costs on an indemnity basis, including solicitor client costs, wasted legal costs and all other costs incurred. enet further reserves its rights to separately seek any damages incurred to its business by reason of the actions of COV. Our clients do so in circumstances where the COV is on full notice of the fundamental injustice being carried out in issuing a Valuation Certificate in breach of the Act and in disregard of a previous finding of the Valuation Tribunal."

19. As appears, the application for a preliminary hearing was grounded on an allegation that the decisions under appeal constituted both an abuse of process and an unjustified collateral attack on an earlier determination of the Valuation Tribunal, i.e. the 2007 Determination.

20. This approach was consistent with the content of the Grounds of Appeal filed by PlanNet 21 and ENET, respectively. For example, it is pleaded as follows in PlanNet 21's Grounds of Appeal.

> "7. The purported valuation is erroneous in law and/or in fact as it fails to have regard to the decision of the Valuation

Tribunal in VA07/2/005.

> 8. The purported valuation is erroneous in law and/or in fact as it fails to have regard to the agreement and/or acknowledgement by the Respondent that the appeal which resulted in the decision of the Valuation Tribunal in VA07/2/005 would constitute a test case for the entire metropolitan area network ("*MAN*") system throughout the State. The property forms part of that system and accordingly the decision of the Valuation Tribunal in VA07/2/005 amounts to a binding determination and/or precedent as to the non-rateability of the property.
>
> 9. The purported valuation is erroneous in law and/or in fact as it fails to have regard to the agreement and/or acknowledgement by the Respondent in the course of the appeal which resulted in the decision of the Valuation Tribunal in VA07/2/005 that service providers or operators of MANSs (who were customers of the State's concessionaire E-Net), of which the Appellant is one such service provider or operator, were not in rateable occupation of such properties.
>
> 10. The purported valuation is erroneous in law as it amounts to an abuse of process and/or an attempt to revisit a matter that is *res judicata* having regard to the decision of the Valuation Tribunal in VA07/2/005."

21. Similar pleas were included in the Grounds of Appeal lodged by ENET.

22. I will return to discuss the implications for the Valuation Tribunal of the approach being advocated for by PlanNet 21 and ENET in more detail at paragraph 59 below. For present purposes, it is sufficient to flag that a finding by the Valuation Tribunal that the issue of rateability was *res judicata* would have precluded the Commissioner from advancing any argument (i) that the 2007 Determination had been incorrectly decided, (ii) that it had been decided *per incuriam*, or (iii) that it should be revisited.

23. Returning to the chronology, Arthur Cox Solicitors repeated their request that the earliest possible date be fixed for a preliminary hearing as to rateability by letter dated 25 September 2014. The letter cited the six-month time-limit envisaged by section 37 of the Valuation Act 2001. (Prior to its amendment under the Valuation (Amendment) Act 2015, this section had stated that the tribunal "shall" make a decision on an appeal within six months from the date of its having received the appeal).

24. The Valuation Tribunal, on or about 26 September 2014, replied by email letter stating that the appeals would be processed in the most efficient way possible within the constraints imposed upon the tribunal by the receipt of more than 980 revaluation appeals.

25. Arthur Cox Solicitors renewed their request that the earliest possible date be fixed for a preliminary hearing as to rateability by letter dated 1 December 2014.

26. The next significant event in the processing of the appeals was the sending of a letter dated 13 October 2015 by the Valuation Tribunal to Arthur Cox Solicitors indicating that the appeal would be assigned a hearing date in December 2015 or January 2016. In the interim, the appeal was to be listed at a call over of cases to be held before the Valuation Tribunal on 26 November 2015. This letter was responded to by a letter of 30 October 2015 repeating the request for the matter of rateability to be dealt with as a preliminary issue.

27. There is no transcript of the proceedings before the Valuation Tribunal on 26 November 2015. It appears, however, from a subsequent letter sent by the Registrar of the Valuation Tribunal on 30 November 2015 that directions had been given for the hearing of a preliminary issue. The hearing was fixed for two days, commencing on 23 February 2016.

28. The precise nature of the preliminary issue is not defined in the letter of 30 November 2015. Moreover, the letter indicates that evidence could be given at the hearing.

> "The Preliminary Issue in relation to the following appeals has now been listed for hearing by the Tribunal on the dates and times set out hereunder. These appeals have been entered in the Register of Valuation Appeals and have been allocated the following numbers which constitutes the title of the Appeals and should be quoted on all documents and communications.
>
> […]
>
> As discussed at the call over of the 26th November, 2015 I am to ask both parties to submit to the Tribunal a summary of evidence (at least 4) proposed to be adduced at the hearing of the Preliminary Issue and to arrange an exchange of such summary with the other party. This summary should include relevant photographs and maps of the subject properties and comparisons. I confirm that submissions on the appellants behalf are due by 12.00 p.m. on 22 January, 2016 and submissions made on behalf of the Commissioner of Valuation are due by 12:00 p.m. on 12 February, 2016. In addition the appellant's representative, Arthur Cox solicitors, will have until 12:00 p.m. on the 19th of February, 2016 to make additional submissions in response to the submissions lodged on the behalf of the Commissioner of Valuation."

29. The letter goes on to address the position in relation to legal submissions.

30. It appears that at the call over on 26 November 2015, the Minister may have been given liberty to apply to register an interest in being joined to the appeals filed by PlanNet 21 and ENET. The Minister subsequently formally sought to intervene in the appeals as an interested party by letter dated 14 December 2015.

31. In the event, the hearing of the preliminary issue did not proceed as intended on 23 February 2016. When the hearing opened before the Valuation Tribunal on that date, there seems to have been some initial disagreement between the parties as to whether the Minister should be joined to the appeals, and, if so, whether the hearing of the preliminary issue could proceed on that day or should be adjourned. The Valuation Tribunal ultimately resolved this dispute by directing that all the appeals be listed together, and that the appellants in the first set of appeals be treated as interested parties in the second set of appeals, and *vice versa* for the appellants in the second set of appeals. (It will be recalled that the Minister had his own appeals in respect of four properties, one of which was the subject of the valuation certificate issued against PlanNet 21).

32. All the appeals were listed for hearing on 22 September 2016, with the Minister's appeals going first. The hearing took place over four days: 22 September; 23 September; 7 November and 18 November 2016.

33. The Valuation Tribunal issued its Determination on 26 June 2017 ("the 2017 Determination").

REQUEST FOR INFORMATION

34. There is one further aspect of the procedural history which should be noted now, given its significance to the "fair procedures" grounds in the judicial review proceedings. PlanNet 21 and ENET had maintained the position from the outset that the preliminary issue could be determined without the need for oral evidence. It was suggested, however, that the issue could be informed by an agreed statement of facts. In the covering letter enclosing their clients' written submissions, Arthur Cox Solicitors stated as follows in relation to the necessity for oral evidence.

> "As mentioned at the call over the matter involves a discrete legal preliminary issue as to rateability, capable of being informed by a statement of agreed facts so as to avoid the need for oral evidence, which will save on costs and the Valuation Tribunal's time. In that regard we have set out the relevant facts at paragraph 4 of the document and invite the Commissioner of Valuation to acknowledge that these may be treated as agreed facts. We have requested that the Chief State Solicitor make this acknowledgement to us by 1 February 2016."

35. The proposed agreed facts were set out as follows at paragraph 4.1 of the written submissions of 25 January 2016 as follows.

"4.1 The position of the Commissioner of Valuation is yet to be articulated, but it is difficult to see how there could be any dispute regarding the following facts:

> (a) In advance of the hearing of Appeal No. VA/07/005, the Commissioner of Valuation agreed that the MAN which was the subject of that appeal would be a test property in respect of other MANs throughout the State.
>
> (b) The Valuation Tribunal heard and determined Appeal No. VA/07/005 on the basis of an agreement that it was either the State or E-net that was in paramount occupation of the MANs and there was no suggestion that service providers were in rateable occupation.
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> (c) PlanNet 21 is a service provider and in that capacity it has contracted with E-Net in respect of the MAN the subject matter of the present appeal.
>
> (d) The Concession Agreement (which was examined by the Valuation Tribunal in Appeal No. VA/07/005) remains in force.
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> (e) The Concession Agreement has not been varied to alter the nature of the relationship between the Contracting Authority and Enet, as regards the occupation by the Contracting Authority of the MANs, since the Valuation Tribunal gave its decision in Appeal No. VA/07/005.
>
> (f) No other arrangements have been entered into between the Contracting Authority and E-net regarding the MAN's since the Valuation Tribunal gave its decision in Appeal No. VA/07/005.
>
> (f) The MAN which is the subject matter of the present appeal falls within the Concession Agreement and all of E-Net's rights in respect thereof exist solely by virtue of the Concession Agreement."
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> *Footnote omitted.

36. By letter dated 11 February 2016, the Chief State Solicitor's Office ("CSSO") on behalf of the Commissioner sought to put forward a much more comprehensive statement of agreed facts. In particular, the proposed agreed facts addressed the precise make-up of the MAN infrastructure in detail, i.e. in terms of dimensions of the ducts, sub-ducts, and the fibre optic cables. There was also a detailed description of the nature of optical fibres, and an explanation of the distinction between "dark" and "lit" fibres.

37. It seems reasonable to infer that these facts were sought to be agreed in order to allow the Commissioner to advance an argument that individual fibre optic cables were capable of being occupied for rating purposes separately from the other elements of the overall infrastructure. (It seems that the Commissioner wished to rely in this regard on the judgment of the Court of Appeal of England and Wales in *Vtesse Networks Ltd. v. Bradford* [2006] EWCA Civ 1339).

38. The letter from the CSSO also requested further information on matters such as the number and length of fibres assigned to PlanNet 21; how those fibres were distinguished from other fibres or the fibres of other users; and how the fibres were connected at each end to the balance of PlanNet 21's network. Information was also sought in relation to co-location facilities, and in relation to the contractual arrangements and final payments.

39. This request was addressed as follows in the replying written legal submissions dated 19 February 2016 filed on behalf of PlanNet 21 and ENET.

> "9. The Commissioner of Valuation's attempt to obtain agreement on a range of factual matters (as set forth in the letter from the Chief State Solicitor's office dated 11 February 2016) has nothing to do with the issue regarding the consequences of the Previous Judgement on which the Appellants have asked the Valuation Tribunal to rule. As is apparent from the extensive set of propositions set forth, it is directed towards obtaining evidential material to bolster its collateral attack on the Previous Judgement by contending that PlanNet 21 is in rateable occupation of part of a MAN.
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> 10. What is more telling about the Commissioner of Valuation's stance is that at no stage has it been suggested that there has been any change in circumstances from those pertaining at the time of the Previous Judgement which might justify revisiting that determination."

40. As explained presently, the Valuation Tribunal at no stage identified what version of the agreed facts, if any, it was relying upon for the purposes of the preliminary issue. Notwithstanding this, and notwithstanding that it (incorrectly) interpreted the application for a preliminary hearing as being for a "*hearing of a substantive appeal without evidence*", the Valuation Tribunal then criticised the Commissioner for an alleged failure to adduce evidence at the hearing.

DISCUSSION

OVERVIEW

41. As appears from the initial request of 4 September 2014 for a preliminary hearing, same was framed as involving a determination on the question of the *rateability* of the infrastructure, i.e. separate from the valuation of same. The rationale for such an approach was that it was said that it was an abuse of process for the Commissioner to have issued the valuation certificates in the first

instance, and that this involved a collateral challenge to the 2007 Determination.

42. That this was the basis for the preliminary issue is confirmed by the content of the written legal submissions filed on behalf of PlanNet 21 and ENET. Their written submissions of 25 January 2016 are divided into four parts, as follows: (1) an introduction which addresses in some detail the terms of the 2007 Determination; (2) a discussion of the doctrines of *res judicata* and abuse of process; (3) a discussion of the appropriateness of adjudicating upon a preliminary or discrete issue, by reference to the judgment of the Supreme Court in *Campion v. South Tipperary County Council* [2015] IESC 79; [2015] 1 I.R. 716; and (4) a short section setting out what are said to be the relevant facts (which has been reproduced at paragraph 35 above).

43. A similar approach was adopted in the Minister's submissions of 22 March 2016.

> "3. In all five appeals, the appellants have pleaded that the matter is *res judicata* and that it has been determined that the State is in rateable occupation of the MANs. All appellants seek to have this ground of appeal determined as a preliminary issue as it could be determinative of the appeals. These submissions deal only with the preliminary issue and the jurisdiction of the Tribunal to deal with it as such."

44. At this point of the judgment, it might be helpful to pause briefly, and to recall the precise consequences of the doctrine of *res judicata* and the rule in *Henderson v. Henderson*. The doctrine and rule are intended to ensure the finality of litigation, and to guard against possible abuse of process. If a party has litigated issues, and those issues were decided against that party, or that party failed to raise an argument which was available to him at that time, then that party is thereafter precluded from re-agitating those issues.

45. The term *res judicata* is often used as shorthand to describe two related concepts as follows. The first is cause of action estoppel which precludes the same parties from bringing a particular cause of action which has been finally determined by a court of competent jurisdiction. The second is issue estoppel which precludes parties from litigating a particular issue which has previously been decided against them.

46. It seems that, at one stage in the written procedure before the Valuation Tribunal, reliance was being placed on a further species of *res judicata*. More specifically, in answer to an objection that neither PlanNet 21 nor ENET had been a party to the 2007 Determination, it had been submitted on their behalf that the 2007 Determination operated in rem. It seems that this objection was subsequently overtaken by the fact that the Minister was joined to the notice parties' appeals and all appeals were listed for hearing together. The Minister had been a party to the 2007 Determination, and, as such, clearly had standing to advance an argument based on *res judicata* (issue estoppel).

47. Insofar as the rule in *Henderson v. Henderson* was concerned, the appellants had, in their written legal submissions of 13 September 2016, cited the judgment of the Supreme *Court in Carroll v. Ryan* [2003] 1 I.R. 309 at 317 as follows.

> "There is a well established rule of law whereby a litigant may not make the same contention, in legal proceedings, which might have been but was not brought forward in previous litigation. This rule is often traced to the judgment of Wigram V.C. in *Henderson v. Henderson* (1843) 3 Hare 100. The learned Vice-Chancellor spoke as follows at pp. 114 and 115:-
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> > '… I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.'
>
> A number of decisions affirming this approach were opened to us. Two of these were Irish cases. In *Russell v. Waterford and Limerick Railway Co*. (1885) 16 L.R. Ir. 314, Dowse B. said at p. 321, quoting from the decision of Willes J. in Nelson v. Couch 15 C.B. (N.S.) 99 at p. 108 of that report, that:-
>
> > 'Where the cause of action is the same, and the Plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action.'
>
> Similarly, in *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345, Palles C.B. held at p. 372, that a party to a previous litigation was bound 'not only [by] any defences which they did raise in that suit, but also any defence which they might have raised, but did not raise therein'. In the judgment of Kelly J. in the instant case, he also referred to *Barrow v. Bankside Ltd*. [1996] 1 W.L.R. 257 and to *Johnson v. Gore Wood & Co.* [2002] 2 A.C. 1. The first of these cases speaks in terms of issues that might 'sensibly' have been brought forward in previous litigation and also suggests that the rule of what is sometimes referred to as 'estoppel by omission' is not in fact based on res judicata in the strict sense but it is an independent rule of public policy. Lord Bingham held that the court must take the need for efficiency in the conduct of litigation into account.
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> In *Woodhouse v. Consigna* [2002] 1 W.L.R. 2558, Brooke L.J. referred to this public interest and continued at p. 2575:-
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> > 'But at least as important is the general need, in the interests of justice, to protect the respondents to successive applications in such circumstances from oppression. The rationale for the rule in Henderson v. Henderson (1843) 3 Hare 100 that, in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interest as well as that of the parties themselves, that litigation should not drag on for ever, and that a defendant should not be oppressed by successive suits where one would do …'
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> This seems quite consistent with what Lord Bingham said in *Johnson v. Gore Wood & Co*. [2002] 2 A.C. 1, at p. 31 when he urged that the court should arrive at:-

> '… a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.'

48. One consequence of the doctrine of *res judicata* and the rule in *Henderson v. Henderson* is that, where they apply, it does not matter whether the original decision was right or wrong. The affected party is not entitled to agitate legal issues which either (i) were previously decided against it, or (ii) were not argued at the time. This is one of the key distinctions between *res judicata* and the general system of precedent or stare decisis. The 2007 Determination is clearly relevant to the current dispute between the parties as a *precedent.* However, unless bound by *res judicata* or the rule in *Henderson v. Henderson*, the Commissioner would be entitled to make arguments to the effect that the 2007 Determination can be distinguished on the facts, or that it was incorrectly decided, or that it should not be followed for some other reason.

49. This distinction assumes a particular importance in this case in that the Commissioner wished to advance a detailed argument by reference to the judgment of the Court of Appeal of England and Wales in *Vtesse Networks Ltd. v. Bradford* [2006] EWCA Civ 1339. This judgment upheld a ruling of the Land Tribunal to the effect that individual optical fibres in a telecommunications network (i) constituted a separate hereditament from the cables and ducts within which they were located; and (ii) were capable of rateable occupation.

50. The Commissioner relied, in particular, on the following passage from the Land Tribunal's ruling (which was upheld by the Court of Appeal).

> "39 There are, in my judgment, three features of Vtesse's use of the leased fibres that are of the greatest significance. The first is that Vtesse's entitlement under each of the agreements is to the use of particular fibres. Reliance was at one time placed by Vtesse on the fact that under certain of the agreements (the Global Crossing one, for instance) the leasing company undertook to provide for Vtesse's use a pair of fibres, without tying the obligation to any particular identified fibres. However, as Mr Wood accepted, once a pair of the company's fibres had been spliced to Vtesse's own-build fibres, Vtesse's rights under the agreements related to the particular fibres that had been so spliced. The leasing company was thus not providing a service for Vtesse through the routeing of signals along any fibres that it might choose to employ for this purpose but was providing specific fibres for the use of Vtesse. The second significant feature is that Vtesse's use of the leased fibres was exclusive. No one, neither the leasing company nor another operator, could use those particular fibres. Thirdly, it was Vtesse, and Vtesse alone, that activated the fibres for the transmission of signals. It did this through the generation of a laser pulse in its own equipment, and it synchronised the receiver so that a meaningful signal could be transmitted. By this means, through its active operation of its system, Vtesse was able to provide a service for its customers. The leasing companies simply provided, and maintained, the fibres."

51. It occurs to me that paragraph [40] of the Land Tribunal's ruling is also potentially relevant.

> "40 These features are, in my judgment, decisive in determining that Vtesse was in rateable occupation of the leased fibres and that its system constituted a single hereditament. The leasing companies retained no control over Vtesse's use of the fibres. They had the right to substitute other fibres for the ones that had been spliced to Vtesse's fibres. The nature of this right was clearly different from those of the landowners in the East London Waterworks and Electric Telegraph cases to require the relocation of the pipes and wires, since there the pipes and wires were and remained in the ownership of the operators. But the right to substitute other fibres was limited by the agreements, and on the evidence there has been extremely little interruption of the continuous use by Vtesse of the leased fibres. The duty of the leasing companies to maintain the fibres to an agreed standard is no different from the duty of a landlord under the lease of premises. Similarly the fact that Vtesse did not know where the leased fibres were and had no right to access them physically is of little significance. It did not need to know where they were or to have physical access to them in order to enjoy their use."

52. As appears from paragraphs [32] to [38] of the judgment of Lloyd L.J. in the Court of Appeal, this approach was upheld in principle. Lloyd L.J. held that it was open to the Land Tribunal to conclude that Vtesse were in actual occupation of the optical fibres, and that this occupation was exclusive, not being shared with, and therefore not subordinate to, that of the third party.

53. As an aside, it is to be noted that the question of rateability in *Vtesse* had been dealt with as a preliminary issue by the Land Tribunal. Unlike the present case, however, the preliminary issue was carefully defined. (See paragraph [2] of the Court of Appeal judgment).

NO AGREED SET OF FACTS

54. The purpose of the trial of a preliminary issue is usually to allow for the determination of discrete points of law in advance of a full hearing. This is done on the basis that the resolution of these issues may either foreshorten the substantive hearing or obviate entirely the need for a lengthy and costly trial. The classic example is the trial of a preliminary issue in respect of the Statute of Limitations.

55. A court will not, however, direct the trial of a preliminary issue unless either (i) the parties have agreed a statement of facts for that purpose, or (ii) the party seeking the trial of the preliminary issue is prepared to accept the other side's case at its height for the purpose of the trial of the preliminary issue. This has recently been reconfirmed by the Supreme Court in *Campion v. South Tipperary County Council* [2015] IESC 79; [2015] 1 I.R. 716. McKechnie J., for the court, reiterated that (i) there cannot exist any dispute about the material facts as asserted by the relevant party: such can be agreed by the moving party or accepted by him or her, solely for the purposes of the application; and (ii) there must exist a question of law which is discrete and which can be distilled from the factual matrix as presented.

56. Regrettably, the Valuation Tribunal did not identify either (i) the precise legal issues which were to be determined on a preliminary basis, or (ii) the agreed set of facts against which that preliminary issue was to be tried. This is so notwithstanding that the tribunal had been referred to the judgment in *Campion*, and, in fact, cited a different part of that judgment in its own Determination.

57. This omission was all the more serious given that the Commissioner had sought to include, as part of the statement of facts, factual matters in support of his argument that the fibre optic cables were capable of separate occupation for rating purposes. (See paragraph 34 et *seq*. above). The Valuation Tribunal not only failed to identify which version of the statement of facts it intended to rely upon for the purpose of the preliminary issue, but actually went so far as to criticise the Commissioner for failing to adduce evidence. This criticism is unjustified, and overlooks the point that, in the absence of an agreed statement of facts, the appellants,

as moving parties in the application for the trial of a preliminary issue, had to take the other side's case at its height.

58. The various failures of the Valuation Tribunal in this regard appear to have stemmed from a misunderstanding on its part of what precisely it was being asked to do by the appellants. In particular, the Valuation Tribunal appears to have mistakenly thought that it was being asked to direct a summary trial without evidence of the substantive appeal, rather than the trial of a preliminary issue.

THE PRELIMINARY ISSUES BEFORE THE VALUATION TRIBUNAL

59. The Valuation Tribunal was required to identify what the legal implications of the existence of the 2007 Determination were for the appeals before it. This necessitated the Valuation Tribunal considering a number of specific issues, as follows.

> (i) First and foremost, whether the doctrine of *res judicata* and/or the rule in *Henderson v. Henderson* applies to taxation matters. The Commissioner had relied on chapter 10 of McDermott, *Law on Res Judicata and Double Jeopardy* (Butterworths, 1999); and *Clare County Council v. Mahon* [1995] 3 I.R. 193 in support of an argument that a decision on tax and rates for one year raises no estoppel for another year of assessment. In response, the appellants drew attention to a judgment, namely *Queensland Trustees Ltd. v. Commissioner of Stamp Duties* (1956) 96 C.LR. 131, which was cited in McDermott as an exception to what the appellants described as any "supposed rule regarding the inapplicability of estoppel within the realm of rating and taxation".
>
> (ii) Secondly, it was necessary to consider whether the 2007 Determination addressed the argument that the use of *individual fibre optic cables* by service providers could represent *occupation* for rating purposes. This was the argument which the Commissioner wished to advance, by reference to the judgment of the Court of Appeal of England and Wales in *Vtesse Networks Ltd. v. Bradford* [2006] EWCA Civ 1339. If this question had not been decided by the 2007 Determination, then *res judicata* in the strict sense could not apply. A separate issue would arise as to whether the rule in *Henderson v. Henderson* applied, i.e. did a failure on the part of the Commissioner to advance an argument in 2007 in respect of service providers preclude him from pursuing any such argument in 2016. Before getting to that issue, however, the Valuation Tribunal would first have to consider whether the 2007 Determination had actually decided the question of occupation by service providers. Again, the parties to the 2014 appeals had made detailed submissions on the point. The submissions addressed, in particular, paragraph 30 of the 2007 Determination which records senior counsel for the Minister as stating that the parties were agreed that the occupier was either (i) the Minister and the relevant local and public authorities, or (ii) the concessionaire, and that there was no suggestion that the service providers were in rateable occupation.
>
> (iii) Thirdly, consideration would have to be given to whether the 2007 Determination might be distinguished by reference to either (i) a change in circumstances—including any changed or new contractual arrangements between ENET and service providers—from those obtaining in 2007, or (ii) more detailed information as to the make-up of and operation of the MANs notwithstanding that this was not "new" information which could not have been adduced in 2007. This latter point would again require consideration of whether the introduction of such information was precluded by the rule in *Henderson v. Henderson*.

60. As discussed under the next heading below, the 2017 Determination (i) fails to address the first point at all; (ii) appears to have decided the second point *in favour* of the Commissioner but then rules against him on the substance of the appeal; and (iii) fails to address the third point in detail on the basis that the Commissioner had failed to adduce evidence.

2017 DETERMINATION

61. When the appeals ultimately came before the Valuation Tribunal for hearing in September and November 2016, there were two principal issues for adjudication. First, the Valuation Tribunal was required to rule upon the procedural objection raised by the Commissioner that it (the tribunal) did not have jurisdiction to conduct the trial of a preliminary issue at all. This objection was based, in part, on the fact that—unlike the position under the Rules of the Superior Courts—there is no *express* provision made in the procedural rules of the Valuation Tribunal for the trial of a preliminary issue.

62. Secondly, in the event that the Valuation Tribunal decided that it did have jurisdiction to conduct the trial of a preliminary issue, then it would be necessary for the tribunal to adjudicate on the appellants' allegation that the question of whether the infrastructure is exempt from rates is *res judicata* and/or subject to the rule in *Henderson v. Henderson.* This required consideration of the matters identified at paragraph 59 above.

63. The Valuation Tribunal failed to discharge either of these functions properly. First, insofar as the procedural objection was concerned, the Valuation Tribunal failed to appreciate what was involved in the proposed trial of a preliminary issue. In particular, the Valuation Tribunal appears to have thought—mistakenly—that it was being asked to determine the substantive appeal on a summary basis without any evidence. That this was the tribunal's understanding is evident, in particular, from pages 13 and 14 of the Determination. There is reference at page 13 to the appellants arguing for a jurisdiction to hear and determine the substance of an appeal on a preliminary basis, where evidence has not been heard, tested and evaluated. There is reference at page 14 to "disposing of a substantive appeal on a preliminary basis", and to "the hearing of a merit-based appeal on a preliminary basis".

64. At page 19 of the Determination it is stated as follows.

> "The position as put forward by the Appellants is, by any measure, exceptional; a hearing of a substantive appeal without evidence. It is undoubtedly the case in this particular forum (the Valuation Tribunal) in the vast majority of substantive appeals there is evidence on both sides with the testing of same and where appropriate oral/written submissions. This is the norm for good and understandable reason:".

65. The Determination then goes on to cite a passage from the judgment of the Supreme Court in *Campion v. South Tipperary County Council* [2015] IESC 79; [2015] 1 I.R. 716, before stating as follows.

> "The Appellants press for a mode and/or manner of hearing which is, by any measure, exceptional. This, in and of itself, does not, in the Tribunal's view operate as a rigid bar to that jurisdiction.
>
> It does however invite and require caution. This is a caution which has its genesis in the constitutional prescripts and/or requirements as referred to above. The Tribunal must conduct its business appropriately and fairly, ensuring that both appellant and respondent have, in the circumstances as presented, been treated fairly.

66. At page 20, there is an inaccurate reference to the appellants' request that "the current appeals be dealt with summarily (without

evidence)" .

67. It is stated as follows at page 21.

> "It follows that this Tribunal when assessing fairness in the particular circumstances of this appeal, is entitled to take the view that the Minister and relevant interested parties such as enet have secured a prima facie entitlement to ask this Tribunal to determine the current appeals on a preliminary basis and without the need to go into evidence."

68. These errors then flowed through to the second aspect of the Determination, namely the adjudication upon the preliminary issues. This part of the Determination is headed up "The Substantive Decision"; the general principles governing rateability, e.g. property, occupation and rateable occupation, are set out precisely as one would expect to find in any determination following a *full* hearing. All of this strongly suggests that the tribunal was embarking upon the consideration of the merits or substance of the appeals, i.e. it had moved beyond a consideration of the preliminary issue. Insofar as there is discussion of the 2007 Determination in this context, it appears to be treated as a *precedent* rather than as a decision which is binding on the parties by reference to the doctrine of *res judicata* and/or the rule in *Henderson v. Henderson*.

69. The Valuation Tribunal then goes on to ask at page 30 whether the Commissioner's decision "stands up to scrutiny". Again, this strongly suggests that the 2017 Valuation Tribunal was determining the substance or merits of the appeals. Such an approach could only have been legitimate in the context of a full hearing of the appeal, with evidence.

FAILURE TO ADDRESS RELEVANT ISSUES

70. A description of the type of issues which should have been addressed in the context of the preliminary issue which the appellants actually sought to have determined has been set out at paragraph 59 above.

71. The first issue was whether the doctrine of *res judicata* and/or the rule in *Henderson v. Henderson* applies to taxation matters. This issue is not discussed at all in the operative part of the 2017 Determination. Rather, the approach adopted by the Valuation Tribunal seems to have been that it was determining the substantive appeal, namely whether the infrastructure was exempt from rates under section 15(3) of the Valuation Act 2001.

72. The second issue was whether the 2007 Determination addressed the argument that the use of *individual fibre optic cables* by service providers could represent *occupation* for rating purposes. The Commissioner wished to make this argument, at a full hearing, by reference to the judgment of the Court of Appeal of England and Wales *in Vtesse Networks Ltd. v. Bradford* [2006] EWCA Civ 1339.

73. The counterargument being made against the Commissioner was that he was precluded from raising any argument in relation to the legal implications of occupation by service providers of the fibre optic cables in circumstances where that issue was said to have been conclusively determined by the 2007 Determination. Particular emphasis was placed on the following passage from the 2007 Determination.

> "In conclusion Mr. O'Donnell [Senior Counsel for the Minister] submitted that the Contracting Authority, rather than E-Net, was in exclusive and/or in the alternative, paramount occupation of the MANs in question. The parties were agreed that the occupier was either the Contracting Authority (being the Minister and the relevant local and public authorities) or E-Net; there was no suggestion that the service providers were in rateable occupation."

74. As it happens, the 2017 Determination appears to have resolved this dispute, i.e. whether the position of service providers had been determined as part of the 2007 Determination, *in favour of* the Commissioner. At pages 29 and 30 of the 2017 Determination, the Valuation Tribunal indicates that it is prepared to assume that service providers and their occupation of the fibre optic cables were not at issue before the Valuation Tribunal in 2007 and were not considered at that time.

> "This Tribunal, and for the purposes of dealing with the current appeals on a preliminary basis, assumes the following:
>
> Service providers and their 'occupation' of the fibre optic cables were not at issue before the Tribunal in 2007 and not considered by the Tribunal at that time. It follows on this analysis that the 2007 decision did not directly determine this issue, that is to say, whether the service providers and their 'occupation' of the fibre optics cables is rateable.
>
> The issue that is raised on the current appeals is whether, and having due regard to the Tribunal's decision of 2007, the decision to issue the proposed valuation certificates as against the Minister and as against PlanNet 21 and Enasc Éireann Teoranta as grounded, it seems, on the 'occupation' by the service providers of the fibre optic cables stands up to scrutiny."

75. Having decided this particular issue in favour of the Commissioner, the only basis on which the remaining preliminary issues could have been decided *against* the Commissioner would have been if the Valuation Tribunal had made a finding that the Commissioner was caught by the rule in *Henderson v. Henderson*. This would have required the Valuation Tribunal to consider and determine not only the threshold issue of whether *res judicata* applies to taxation matters, but also to consider separately whether the Commissioner could have advanced the argument in 2007 on the basis of the factual circumstances then obtaining. The Valuation Tribunal did not properly engage with any of these issues, but instead went on to ask whether the decision to issue the proposed valuation certificates grounded on the alleged occupation of the service providers "stands up to scrutiny". This indicates that the Valuation Tribunal had moved beyond any preliminary issue, and was embarking upon a consideration of the *substantive merits* of the appeals.

76. The Valuation Tribunal concluded that the Commissioner's decision did not stand up to scrutiny (page 30), and determined that the decision should be varied by the tribunal exercising its statutory powers under section 27 (*recte* section 37) of the Valuation Act 2001 (page 32).

77. Given their length, I have included the relevant passages from the 2017 Determination as an Appendix, rather than interrupt the flow of this judgment.

78. As appears from these passages, one of the grounds relied upon by the Valuation Tribunal (at page 30) is that there was no evidence that supported the Commissioner's position that the service providers' occupation of the fibre optic cables is exclusive occupation.

79. This criticism by the Valuation Tribunal echoes a criticism made *earlier* in the Determination (at page 27) as follows.

> "In considering the decision to issue proposed valuation certificates as against the Minister and as against PlanNet 21, this Tribunal must necessarily do so and by reference to material which has been put in evidence in the course of the hearing of the current appeals.
>
> It may be the case that the Respondent has within his power or control additional material and/or documentation capable of supporting the decision as taken and the grounds for same. It may be the case that the Respondent, consistent with his fundamental objection to jurisdiction, has decided that it is not necessary, warranted and/or appropriate to put such material and/or documentation in evidence at a hearing characterised as 'preliminary'.
>
> This, if it be the case, is in the circumstances unfortunate and puzzling.
>
> It is unfortunate because it has deprived this Tribunal, arguably the first and arguably the most appropriate port of call for ventilating such issues, of an opportunity to have before it all pertinent information when coming to a decision on appeals which it is clear to anyone with an ounce of passing interest have far-reaching implications extending significantly beyond the narrow confines of this Tribunal's statutorily prescribed terms of reference.
>
> It is puzzling, given that the Respondent is on clear notice of the nature and extent of the attack on the decision which is at issue since as far back as the 10th February 2014 (if not earlier). Professional pride, if nothing else, would logically and necessarily propel any publicly funded entity to frame a timely robust and detailed rebuttal of and response to an attack which (on the Respondent's) case is without merit or substance.
>
> And yet, as the chronology of material and relevant correspondence which has been put in evidence shows, the Respondent, and for reasons that have not been made clear to this Tribunal, elects not to engage in any meaningful way with this full-on attack."

80. With respect, these passages confirm that the approach which the Valuation Tribunal took to the preliminary hearing was confused and contradictory. As discussed at paragraph 61 and onwards of this judgment, the Valuation Tribunal appears to have thought—mistakenly—that it was being asked to determine the *substantive* appeal on a summary basis *without any evidence*. In fact, it was only being asked to determine preliminary issues. This should have been done by reference to an agreed statement of facts. In the absence of agreement between the parties, the preliminary issues should have been decided by taking the Commissioner's case at its height.

81. Insofar as one can understand the criticism being made of the Commissioner, it appears to involve an allegation that the Commissioner should have adduced evidence which would have allowed the Valuation Tribunal to *assess* the quality of the alleged occupation of the fibre optic cables by the service providers, i.e. whether it was exclusive or not. Evidence of this type could only ever be relevant to a determination of the *substance* of the appeals, and not to the preliminary issues of *res judicata* and *Henderson v. Henderson* as framed by the appellants. In any event, it is to be noted that the Commissioner had, in fact, sought to include in the agreed statement of facts precisely this type of information. Moreover, the Commissioner had also sought specific information in relation to the physical layout and operation of the infrastructure, and as to the legal agreement put in place as between the concessionaire and the service providers. See paragraph 36 above. These are all matters which could, potentially, be relevant to the argument as to whether the service providers might be regarded as being in exclusive occupation of at least part of the infrastructure, i.e. the fibre optic cables, notwithstanding the ownership by the Minister of the overall MANs. This request for information had been rebuffed by the appellants. The Valuation Tribunal made no directions in this regard.

82. Given this procedural history, the Commissioner had a legitimate expectation that the only issues which would be before the Valuation Tribunal in September and November 2016 would be confined to the question of whether the doctrine of *res judicata* and/or the rule in *Henderson v. Henderson* applied to the 2007 Determination. The Commissioner also had a legitimate expectation that—unless the preliminary issues were decided against him—there would be a second subsequent hearing at which the substantive issues in the appeal would be heard and determined. The Commissioner was entitled to assume that he would be permitted to lead evidence at that subsequent hearing.

83. In reaching the decision it did, and by trespassing on the substantive merits of the appeals in the context of the hearing of preliminary issues, the Valuation Tribunal acted in breach of fair procedures and in breach of the Commissioner's legitimate expectations. It also failed to address the issues which were before it.

DUTY TO GIVE REASONS

84. For the sake of completeness, I should address an argument on the part of the appellants that the Valuation Tribunal did, in fact, properly address the preliminary issues. Leading counsel for the Minister, Mr James Devlin, SC, made a valiant effort to explain the 2017 Determination. Counsel suggested that a finding in respect of *Henderson v. Henderson* was to be found at the top of page 32 of the Determination as follows.

> "The above mentioned 'key provisions' are consistent with the view as taken and as expressed by the Tribunal in 2007 wherein, and as stated, the Tribunal concluded on evidence which was unchallenged that the Minister was in paramount occupation and/or in exclusive occupation of the property and by reason of the degree of control which he, as legal owner, exercised over same."

85. Counsel suggested that the reference to "evidence which was unchallenged" should be understood as referring to the obligation on a party under the rule in *Henderson v. Henderson* to raise issues at the time of the first proceedings. Counsel accepted that there was no reference to *Henderson v. Henderson* in the operative part of the Determination, but suggested that it was not necessary to name-check the judgment.

86. With respect, I cannot accept these submissions. The Valuation Tribunal is under a statutory obligation to provide reasons. See paragraph 4(3) of the Second Schedule of the Valuation Act 2001, as follows.

> "(3) The Tribunal shall issue a written judgment setting forth the reasons for its determination in each appeal."

87. This statutory obligation has recently been considered by the High Court in *Boland v. Valuation Tribunal* [2017] IEHC 660. Murphy J. stated as follows.

> "[…] the Court is satisfied that the judgment of a statutory tribunal such as this, which is required by law to give reasons for its determination, must be a judgment which stands on its own two feet. Reliance cannot be placed on a transcript of

the evidence as interpreted by the notice party to give it sense and meaning. This is particularly so where the notice party, as in this case, is the beneficiary of the tribunal's determination. The notice party has an interest in having the decision of the tribunal upheld and as such cannot truly be described as a *legitimus contradictor.* The notice party is not competent to tell the Court how the tribunal arrived at its decision, only the tribunal can do that in a properly written judgment. An earlier judgment of the respondent tribunal *Orange Tree Ltd. v. Commissioner of Valuation* (VA 06-2-045) expresses succinctly the nature and purpose of statutory appeals:-

> 'An appeal is defined in Black's Law Dictionary as being 'a proceeding undertaken to have a decision reconsidered by a higher authority'. Any appeal process must, procedurally, be and be seen to be carried out in a transparent manner and in compliance with the principles of fairness and in accordance with the law. Rating is a form of taxation and it is important therefore that any appeal process dealing with the valuation of property for rating purposes must not only be fair in operation, but be clearly seen to be so if it is to maintain respect and acceptance by the ratepayer.'

The judgment in this case does not meet this standard because of its failure to set out the facts, the arguments, the findings, the relevant law and the basis for its determination."

88. I respectfully adopt this statement of Murphy J. as a correct statement of the law.

89. I also rely on the very recent judgment of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31 which contains the following general statement as the objective of imposing a duty to state reasons on decision-makers.

> "6.15 Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review.
>
> 6.16 However, in identifying this general approach, it must be emphasised that its application will vary greatly from case to case as a result of the various criteria identified earlier which might distinguish one decision, or decision making process, from another."

90. Here, all of the parties had made detailed submissions to the Valuation Tribunal on the preliminary issues. The Commissioner had raised a specific objection that *res judicata* or issue estoppel did not apply to taxation matters. The parties were entitled to have these submissions properly addressed by the Valuation Tribunal. There is nothing in the 2017 Determination which indicates that the Valuation Tribunal engaged with these issues at all. I have reached the conclusion, therefore, that the Valuation Tribunal did not properly understand the nature of the preliminary issues before it.

91. Lest I am incorrect in this, and these issues were in fact considered, the 2017 Determination is nevertheless invalid for failure to comply with the statutory duty to set forth reasons. None of the preliminary issues are referred to in the operative parts of Valuation Tribunal's determination. This is so notwithstanding that the determination runs to some 33 closely-typed pages. None of the parties could know how the preliminary issues had been dealt with. A quasi-judicial body such as the Valuation Tribunal must meet a high standard. It is not good enough that parties are required to speculate or to read into a determination possible findings.

DISCRETION IN JUDICIAL REVIEW

92. In circumstances where I have concluded that the Commissioner has made out grounds for judicial review, it remains for me to consider whether relief ought to be refused as a matter of discretion. It is well established that judicial review is a discretionary remedy, and that the court is entitled, in principle, to withhold relief from an otherwise entitled applicant by reference to factors such as, for example, delay or the conduct of the applicant.

93. In the present case, leading counsel for PlanNet 21 and ENET, Mr Paul Gardiner, SC, has submitted that relief should be refused to the Commissioner on the basis that it would serve no useful purpose. More specifically, it is suggested that there would be no benefit to remitting the appeals to the Valuation Tribunal for reconsideration as the outcome would be the same as before.

94. It was submitted that the approach of the Commissioner—up and until the penultimate day of the hearing before the Valuation Tribunal—had been that he was not seeking to attack the *res judicata* of the 2007 Determination, but rather was seeking to distinguish it on the basis that there were no service providers *in situ* at that time. Emphasis was placed in this regard on a reference to the Minister retaining the benefit of the 2007 Determination, in an exchange of letters between the solicitors in November 2016 between the third and fourth days of the hearings. The CSSO, in a letter written on behalf of the Commissioner on 11 November 2016, had stated as follows.

> "In the circumstances, we again assert that in the absence of any service provider the Minister retains the benefit of the 2007 decision. That is a situation that will persist in respect of the MAN occupied by the Minister, as in these four appeals."

95. The Commissioner had ultimately conceded on the penultimate day of the hearing before the Valuation Tribunal on 11 November 2016 that (a) there were service providers *in situ* in the MANs at the time of the 2007 Determination, and (b) there had been no change in circumstances since the 2007 Determination. It also seems to have been accepted on the final day of the hearing (18 November 2018) that in fact there were service providers in situ in at least some of the MANs the subject of the 2014 appeals.

96. It was further submitted that the Commissioner's supposed answer to the *res judicata* point had fallen away once he conceded that there were service providers *in situ* as of 2007. The Commissioner was said to have walked straight into a *Henderson v. Henderson* point because of his failure to raise the position of the service providers in 2007. The 2014 appeals should not be remitted, on the basis that the result would be that the 2007 Determination was binding on the Commissioner by virtue of either *res judicata* or Henderson v. Henderson. The Commissioner was said to be bound by the agreement which he had reached with the Minister in 2007 as to the progression of a test case. Emphasis was placed on the supplemental affidavit sworn on behalf of the Minister by Mr Brendan Whelan on 13 June 2018, which states that it was agreed that the 2007 test case would determine the status of all MANs in the country. It was said that, in all the circumstances, the parties should not be put to the expense of a further hearing before the Valuation Tribunal.

97. In support of the above submissions, counsel referred me to the judgment of the Supreme Court in *Smith v. Minister for Justice and Equality* [2013] IESC 4.

98. This judgment is authority for the proposition that one of the factors which a court can consider in the exercise of its discretion is whether, as a matter of practical reality, there would be any point in remitting a matter to a decision-maker in circumstances where the outcome was likely to be the same.

> "6.1 It is important to carefully identify the role of discretion in the context of judicial review applications such as that with which the court is now concerned. In so doing, it is important to emphasise that the term 'discretion' does not mean that a judge can override, in any way, the law. Nor can a judge, by the exercise of discretion, interfere with the rights of any individual as such. Indeed, in that context, it might be suggested that the term 'discretion' is apt to mislead. What, in truth, the term implies is that there may be a range of factors which can properly be taken into account by the court, as a matter of law, in determining whether an applicant is entitled to a remedy and if so what remedy.
>
> 6.2 On the facts of this case, it seems to me that the trial judge was entitled to consider whether, as a matter of practical reality, there would be any point in referring this matter back to the Minister to reconsider."

99. The applicant in *Smith* had sought to challenge the refusal of the Minister for Justice and Equality to revoke a deportation order. The Supreme Court, per Clarke J. (as he then was), held that there were no arguable grounds for judicial review. The court went on to say that it was more than open to the High Court judge to conclude that there were ample discretionary grounds for declining judicial review, even if some technical deficiency in the Minister's decision had been established. In particular, having regard to (i) the poor immigration history of the applicant, (ii) his reckless disregard of the rights of his own family members, and (iii) the fact that he had engaged in serious criminality, the Minister would be almost certain to refuse to revoke the deportation order.

100. I do not think that the present case comes even close to the extreme set of facts considered by the Supreme Court in *Smith*. The outcome of a reconsideration of the appeals by the Valuation Tribunal cannot be predicted with any certainty. This is precisely because the 2017 Determination failed to engage with the issues of *res judicata* and the rule in *Henderson v. Henderson*. In particular, the question of principle as to whether res judicata or issue estoppel has any application to matters of taxation has not been addressed by the Valuation Tribunal. Quite properly, this question was not argued before me in the within judicial review proceedings in circumstances where the challenge to the 2017 Determination was predicated primarily on alleged breaches of procedure and a failure to state reasons. However, insofar as I have been expressly invited to exercise my *discretion* to refuse relief on the basis that the outcome of any reconsideration of the appeals is obvious, it is necessary to consider these questions to the following limited extent.

101. Suffice it to say that there is a respectable argument that taxation is an exception to the doctrine of *res judicata* and issue estoppel. This argument tends to be supported by the chapter from McDermott, *Law on Res Judicata and Double Jeopardy* (Butterworths, 1999) which was relied upon by the Commissioner at page 17 of his written submissions of 13 June 2016.

> "[10.01] A decision on tax or rates for one year raises no estoppel for another year of assessment. The basis of this rule appears to be one of public policy based on the reluctance of the courts to hamper the execution of statutory duties by revenue officials, and the fact that the decision by the court in one revenue case can have wide repercussions throughout the whole field of tax-gathering. However, although a decision on tax or rates raises no estoppel on the issue of another year's assessment, it can ground an estoppel on the issue in respect of the year in question. The United States Supreme Court has held that similar principles apply to judicial decisions on customs duties. Such decisions are only *res judicata* in respect of the subject importation, and both importer and the customs authorities can relitigate the issues again in respect of later importations.
>
> [10.02] The non-application of estoppel in such cases appears to have few limitations. In one Australian case it was held that where a series of connected transactions covering the same facts are assessable at different dates for stamp, debt or gift duty, a decision as to the effect of one of the documents in this series may estop the taxpayer or the Revenue from later asserting that duty on a second document is assessable in a manner inconsistent with the decision in the first suit."

102. (The reference to the Australian case is to *Queensland Trustees Ltd. v. Commissioner of Stamp Duties* (1956) 96 C.LR. 131 which was cited in counterargument before the Valuation Tribunal by the appellants).

103. The Commissioner's argument also tends to be supported by the judgment in *Clare County Council v. Mahon* [1995] 3 I.R. 193 which was expressly relied upon both in the written submissions, and at the hearing before the Valuation Tribunal. (See Transcript, 7 November 2016, page 119 *et seq*.). Counsel for the Commissioner, Mr Conor Power, SC, had emphasised that the proposed valuation certificates the subject of the appeals were issued in the context of a revaluation exercise carried out pursuant to a valuation order made under section 19 of the Valuation Act 2001. See also the judgment of Clarke J. in *Lett & Company Ltd. v. Wexford Borough Council* [2007] IEHC 195; [2012] 2 I.R. 198 which had been relied upon by the Commissioner in his written submissions (at page 18) in respect of statutory duties and legitimate expectations.

104. In addition to these authorities, the judgment of the Supreme Court in *Gael Linn teo v. Commissioner for Valuation* [1999] 3 I.R. 296 held—albeit in the specific context of the wording of the previous legislation—that the doctrine of *res judicata* did not restrain the Commissioner from re-opening the issue of the exemption from liability for rates without first proving a change in circumstance.

105. If the Commissioner were to succeed in persuading the Valuation Tribunal that *res judicata* and *Henderson v. Henderson* do not apply, then he would not be bound by the 2007 Determination. The Commission would, of course, still have to persuade the Valuation Tribunal that the 2007 Determination should not be followed as a *precedent*. A precedent can be distinguished or even departed from. In this regard, the Commissioner wishes to make arguments based on the judgment of the Court of Appeal of England and Wales in *Vtesse Networks Ltd. v. Bradford* [2006] EWCA Civ 1339. (See paragraph 49 et seq. above).

106. I simply do not know whether any of these various arguments are well made or not. The appellants have made counterarguments, and, in particular, rely on *Queensland Trustees Ltd. v. Commissioner of Stamp Duties* (1956) 96 C.LR. 131. I deliberately express no view one way or the other. These are not issues before me in the judicial review proceedings. The only reason I refer to these issues at all is in order to address the argument on *discretion*. These issues all relate to matters which appear to fall—in the first instance at least—within the jurisdiction of the Valuation Tribunal. Thereafter, they may be the subject of a case stated to the High Court, and ultimately appealed to the Court of Appeal.

107. In conclusion, I do not think that it would be appropriate for me—under the guise of the exercise of *discretion* in judicial review proceedings—to embark upon what is, in all reality, a consideration of the very issues the subject-matter of the appeals.

108. Finally, for the avoidance of any possible doubt, I reiterate that I have not made any finding on any of the issues set out at paragraphs 101 to 107 above, and this judgment should not be treated as having done so.

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.

110. In all the circumstances, the Commissioner is entitled to succeed in his application for judicial review.

PROPOSED ORDERS

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.

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.

APPENDIX

EXTRACT FROM PAGES 30 TO 32 OF 2017 DETERMINATION

"In the Tribunal's view, the decision as taken does not stand up to scrutiny for the following reasons:

The following is clear from a consideration of the material which has been put in evidence including in particular the revaluation appeals report.

– The Minister is the legal owner of the property concerned. The property at issue operates above and below ground. The Minister is the legal owner of the property in all its guises, be it a co-location facility or be it the myriad of 'structures' beneath. It follows that the Minister is the legal owner of that portion of the various properties which appears to be of particular concern in the current appeals, notably the fibre optic cables.

– The Minister, as legal owner, retains a measure of control over the properties, which measure of control as of 2007 rendered the Minister in 'paramount occupation' for rateable purposes.

– The Minister's position as the legal owner of all of the properties, to include the fibre optic cables, does not appear to be in issue. The revaluation appeal reports appear to expressly recite this fact.

– The Respondent's position is that the service providers (who, by common case, take a licence from enet) are in rateable occupation of the fibre optic cables.

– Such decision, if properly taken, requires the application of relatively straightforward and well settled principles. Amongst those principles is the following, as stated by Barron J. The occupation of a property *'must be exclusive'.*

– Where it must be asked is there evidence that points to and or supports the conclusion as made by the original decision-maker and as confirmed by the Respondent that the service provider's occupation of the property at issue, that is to say, the fibre optic cables, is exclusive. (Is restricted to the occupier concerned, the occupier concerned being in the PlanNet 21 appeal: PlanNet 21).

– One only has to consider the clauses of the so-called key provisions apparently identified by those concerned with the making and/or the standing over of the decision as being of critical significance to appreciate that the decision-maker did not and could not and in the particular circumstances, have logically and or reasonably concluded that the service provider had exclusive occupation of the portion of the property at issue.

– It is clear from a consideration of those key provisions that the party with whom the service operator had entered an agreement retains a significant measure of control of the property referred to therein as the MANS. It is worth reciting afresh the so–called key provisions upon which the decision to issue the proposed valuation certificates appears to have been centrally grounded:

> *'5.5. Operators shall have no unauthorised and/or unsupervised physical access to any enclosures or chambers that form part of the MANS at any time. The MSE may facilitate unauthorised access by an operator to a co-location facility and shall implement supervision procedures as it deems necessary.*
>
> *9.1. Operators and their agents shall not have unrestricted physical access to any MAN at any time. Unauthorised physical access to a co-location facility may be provided by the MSE, subject to agreed supervision procedures where deemed necessary by the MSE.'*

– It is difficult to see how a party who has, by express agreement, limited its entitlement to physical access to the

property can, and at one and the same time, be viewed as being in exclusive occupation. These provisions have been regarded as 'key provisions'. This in and of itself suggests that they are being regarded by the decision-maker as being of singular significance and/or importance with other provisions of less value in terms of assisting the decision-maker in coming to a safe and reasonable conclusion.

As has been stated above, the decision-maker, in addition to considering what might be termed routine requirements, must in the circumstances of this particular decision, have front and centre the 2007 decision.

This necessarily requires the decision-maker to have regard to the level and measure of control which the Minister (as legal owner) exercised over the property. Further, it necessarily requires the decision-maker to have regard to the level and measure of control exercised or exercisable by the Minister over all of the property at issue, to include that portion and or part of the property which may be viewed as vacant/to let/unoccupied at the time of the 2007 decision.

It has never, and at any stage, been suggested that the Minister, whilst legal owner of all of the property (to include the fibre optic cables) relinquished any appreciable measure of control over that part or portion of the property which appears to be at issue, namely the fibre optic cables.

Further, there is no evidence capable of supporting or suggesting this proposition which would appear, in any event and in all of the circumstances, illogical.

The above-mentioned 'key provisions' are consistent with the view as taken and as expressed by the Tribunal in 2007 wherein, and as stated, the Tribunal concluded on evidence which was unchallenged that the Minister was in paramount occupation and/or in exclusive occupation of the property and by reason of the degree of control which he, as legal owner, exercised over same.

Thus, the decision, as taken and upheld, that the service provider is in rateable occupation of the property and/or part or portion thereof does not, and having regard to the material which has been put in evidence, stand up to scrutiny. It follows and the Tribunal so determines that this decision should be varied by the Tribunal in exercising its statutory powers under section 27 of the 2001 Act.

The decision to issue a proposed valuation certificate against the Minister is, in all of the circumstances, difficult to understand. The net effect of the 2007 decision was that the property at issue was not rateable because (a) the Minister was in paramount exclusive occupation of the property and (b) accordingly the provisions of Section 15(3) of the Act that applied; the property being relevant property occupied by the State was not rateable.

A decision to issue a proposed valuation certificate, reciting as it does a specific amount of rates nominating the recipient as occupier and as issued against any individual or entity is, on the face of it, a decision and to the effect that the property concerned and the individual occupation of same are rateable.

On this analysis, the fibre optic cables were in existence in 2007; were not in occupation, i.e. vacant in 2007; were in the ownership of the Minister in 2007. On this analysis, the fibre optic cables were and on the date of revaluation, and in the case of those appeals where there is no service operator in situ in existence: vacant; in the ownership of the Minister.

Where, on this analysis, is there a material shift in, or deviation from, the factual/legal paradigm as presented to the Tribunal in 2007 and which resulted in the 2007 Decision?"