Neutral Citation [2010] IEHC 49

THE HIGH COURT
JUDICIAL REVIEW

2009 723 JR

BETWEEN

MENOLLY HOMES LIMITED

APPLICANT

AND
THE APPEAL COMMISSIONERS AND
THE REVENUE COMMISSIONERS

RESPONDENTS

JUDGMENT of Mr. Justice Charleton delivered the 26th February, 2010

1. The applicants claim the right to cross-examine a tax inspector on a V.A.T appeal before the Appeal Commissioners. In May, 2004 the Revenue Commissioners, through the tax inspector, assessed the applicant Menolly Homes Limited to just under €20M in unpaid V.A.T. on the sale of new houses. Such sales are normally subject to V.A.T., but these apparently took place in the context of a scheme of leasing as between closely related companies. The Revenue Commissioners did not accept the transactions carried a V.A.T. exemption. Menolly Homes claimed they did not owe this amount of V.A.T., or anything like it. They say that the assessment should never have been raised. They appealed to the Appeal Commissioners claiming their leasing arrangements entitled them to a V.A.T exemption. A hearing, lasting so far about 16 days, took place over two years between 21st May, 2007 and 29th May, 2009. This judicial review is essentially about proceedings on that last day. Fundamentally, the applicant claimed that the tax inspector who assessed that the tax was due had no "reason to believe" that an amount of tax was due and payable by them; the statutory formula which allows him to raise an assessment. As taxpayers, they proposed to call that tax inspector in evidence on the appeal before the Appeal Commissioners and to cross-examine him as to his state of mind five years previously when he had raised the assessment. This was with a view to demonstrating one of: a lack of good faith; that his view was not factually sustainable or; that his view was unreasonable. They did not specify which. The Revenue Commissioners protested the calling of the tax inspector for the purpose of cross-examination by the applicant and would not tender him in evidence. They said there was no jurisdiction and, in any event, no issue requiring him to be heard arose. The Appeal Commissioners ruled in the favour of the Revenue Commissioners.

2. The matter now comes here for judgment whereby it is sought to upset that decision and require the respondents to proceed on the basis of allowing the applicant to cross-examine the tax inspector. Two factors, principally, excite the applicants into the thought that there might be profit to this cross-examination: firstly, that the concept of abusive process, whereby the true but underlying nature of transactions are discovered by analysing and redefining an apparently lawful and V.A.T. exempt guise, was not crystallised in European or Irish Law at the time of the V.A.T. assessment; and, secondly, that inquiries made by the Revenue Commissioners into these transactions after the assessment was made might be demonstrated to show them floundering around in post-justification enthusiasm.

3. The applicants contend that an Appeal Commissioner would have authority to call an inspector of taxes or to require the Revenue Commissioners to make him available for cross-examination. The applicant contends that the Appeal Commissioners therefore had jurisdiction to rule that the assessment was not properly raised and thus to strike it down. To do otherwise, it is argued, would leave a want of fair procedures whereby a witness who could be cross-examined, and thus give valuable evidence, would not be heard. This desire to hear from this witness, and to subject him to the challenge of cross-examination was, the applicant say, "well flagged"; the crystallisation of this issue resulting in the ruling against the applicants of the 29th May 2009. Having a "reason to believe" or, more importantly from the point of view of the applicants, not having a "reason to believe", is only ascertainable, the applicant's contend, from the evidence of the tax inspector. Nothing on the face of the documents, they assert, shows the grounds for such a reason and, indeed, the document of assessment from the Revenue Commissioners consists of a characteristically terse statement that V.A.T. is due, followed by a schedule of figures. The wording of the legislation, in referring to the power of the Appeal Commissioners "to reduce or abate" the liability of a taxpayer indicates, it is argued, wide-ranging powers including, in effect, the power to strike down a tax assessment. As to when any taxation issue about the sale and leasing of these new homes as to bank consent, the validity of an arrangement for lease of land and sale, or the legal effect of documents apparently exchanged between related companies, might have arisen, the inspector's mind might not, the applicant argues, be able to say much factually about that, but a great deal could be gleaned through cross-examination as to what he knew, or had "reason to believe", when this allegedly unlawful tax assessment was first raised.

4. In that regard, the majority of the argument before the Appeal Commissioners has hinged on a rule of interpretation in European Law that some might argue has been around since 1974; *van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, (Case 33/74)* [1974] E.C.R. 1229. However, this rule established itself only, it is contended by the applicants, well after the tax assessment with what might be urged to be, from the point of view of the Revenue Commissioners either a reiteration of that principle, or its statement in digestible form, in *Halifax plc, Leads Permanent Development Services Limited, County Wide Property Investments Limited v. Commissioners of Customs and Excise (Case C-255/02)* [2006] E.C.R. I-1609. All of this concerns the redefining of purported legal transactions to achieve a V.A.T. exemption in order to discover their real effect.

5. Fortunately, it is not necessary for me to decide those issues or as to whether there might be any similarity in the situation under review before the Appeal Commissioners and the judgment of this court *Cussens v. Brosnan,* [2008] IEHC 169; now under appeal to the Supreme Court. Rather, this case concerns the jurisdiction on appeal in a V.A.T. assessment before the Appeal Commissioners; whether any jurisdiction to order cross-examination has been decided at that appeal within jurisdiction; and whether a delay of approximately five years between the raising of the assessment and the ruling on the issue of cross-examination informs the courts interpretation of the relevant legislation, or operates as a discretionary bar to any form of judicial review relief that might otherwise arise.

Background

6. The applicants are builders. In respect of a substantial number of the dwellings that they have constructed, they claim to have entered into transactions which much reduce the rate of VAT that they are liable to pay in respect of their business. It is clear that the Revenue Commissioners have a serious issue with the purported transactions whereby taxation is claimed by the applicants not to be due. It is clear, from the correspondence, that these issues were first raised by the Revenue Commissioners in the early part of 2003. In response to what appears to be an ongoing series of communications, the tax adviser of the applicants wrote to the Revenue Commissioners on 19th September, 2003, in the following form:

> "As you know, Menolly Homes Ltd. and Hansfield Ltd., as is common practice in the building industry, contract separately with a house purchaser. Menolly Homes Ltd. sells the land to the purchaser and Hansfield Ltd. contracts to build a house on it for the purchaser.
> At the site which you have queried, Menolly Homes Ltd. engaged Hansfield Homes Ltd. to construct foundations on the plots for the houses its land and entered into a short lease of the plots on which the foundations have been constructed with Hansfield Ltd. which terminates immediately before the conveyance of the plots to the ultimate purchaser.

> As Menolly Homes Ltd. has not waived its exemption, its letting of the plots to Hansfield Ltd. is a VAT exempt letting. It had, therefore, no entitlement to input deduction in respect of the developments (construction of the foundations) on the land.
>
> Section 46(a) of the VAT Act 1971, states that, 'notwithstanding anything in this section or s. 2 VAT shall not be charged on the supply of immovable goods –

a. in relation to which a right in respect of the person making the supply to a deduction under s. 12 of the supply or development of the goods did not arise and would not, apart from s. 35(b)(iii) have arisen'

> In these circumstances, the sale of the site by Menolly Homes Ltd. to the final purchaser is therefore not subject to VAT."

7. There were probably further communications, but I am not privy to them. I am told that a Revenue audit then took place. On 5th May, 2004, the assessment was raised. This enclosed a schedule listing the relevant figures of the amount of tax due, amounting to nearly €20 million. The relevant portion reads:

> "Take notice that whereas I have reason to believe in relation to each of the periods specified in column 1 of the Schedule hereunder, that the amount of tax is due and payable to the Revenue Commissioners by you, being a person liable to pay tax within the meaning of s. 8 of the VAT Act 1972, in one of the following circumstances: (a) the total amount of tax payable by you was greater than the total amount of tax, if any, paid by you, or (b) the total amount of tax refunded to you was greater than the amount, if any, properly refundable or, (c) an amount of tax is payable by you and a refund has been made to you. Now, I, as Inspector of Taxes, exercise the powers conferred on me by s. 23 of the VAT Act 1972, and the regulations made under the Act, have assessed the total tax which should have been paid, or the total amount of the tax which should have been refunded, as the case may be, for each of the said periods in the sums specified in column 2 of the Schedule hereunder . . .
> You may, if you claim that the amount due is excessive, on giving notice to me within a period of 21 days from the date of this notice, appeal to the Appeal Commissioners.
>
> If you appeal this assessment, you must pay the amount which you believe to be due. If the amount pays more than 80% of the tax which is found to be due on the determination of the appeal, and the balance, if any, is paid within one month of the date of the determination, interest in accordance with s. 21 will not be chargeable from the date of the rating of the assessment. Subject to the right of appeal, the Revenue Commissioners will proceed to recover the balance of tax set out in column 4 of the Schedule."

8. The applicants did not pay to the Revenue Commissioners any amount of tax which they claim to "believe to be due". They thought their scheme was valid in law. They paid nothing. Instead they promptly replied:

> "Thank you for the copy of notices of assessment date 27th May, 2004. Unfortunately, we did not receive a copy of this notice. We wish to appeal the assessments for January/February 2002, to November/December 2003, under s. 23 of the VAT Act 1972, of our clients on the grounds that they are excessive".

9. From 21st May, 2007, the hearings before the Appeal Commissioner proceeded. A flavour of the attitude of the Revenue Commissioners to the position of the applicant can be gleaned by quoting paragraph 12 or the affidavit of Etáin Croasdell, dated 8th October, 2009, and filed in this case:

> "[The relevant scheme is] what the second named respondent has submitted [to the Appeal Commissioners] is an attempt to avoid tax on a large scale (in six separate residential estates),[whereby] the applicant purported to put in place a contrived set of arrangements as follows:

- The avoidance scheme involved the applicant, and a 100% related companies, Hansfield Developments Ltd. ("Hansfield"). and Menolly Enterprises Ireland Ltd.("Enterprises)
- The applicant was at all times the owner of the lands in question and purported to employ Hansfield (or sometimes Enterprises) to carry out some initial works (site clearance, foundation works for houses or apartments). VAT would be chargeable to the applicant on the consideration payable by it for these works in the normal way.
- The applicant then, after the initial works had been carried out, purported to execute a two-year lease of the lands with (only) building foundations thereon, with Hansfield as tenant, such lease being allegedly an exempt supply for VAT purposes (there was some cases where construction had commenced prior to the VAT avoidance scheme being contemplated at all, and further circular and artificial arrangements were put in place by the applicant in an attempt to deal with that complication).
- The applicant has alleged that the initial foundation works above were carried out for the purposes of letting the site (with foundations), as opposed to being carried out for the purposes of building and selling houses thereon. That is argued, notwithstanding the context where there was no break in the continuity of construction work on the sites and, notwithstanding that, the dwellings are built on the foundations, principally by the applicant itself (or enterprises) as the main contractors on site.
- A taxpayer engaged in a supply of VAT exempt (as opposed taxable) goods or services is not entitled to a credit for VAT suffered by it on its business purchases/inputs. The applicant argues that, as the initial works in this case were allegedly carried out for the purposes of the exempt letting described (rather than for the construction and taxable sale of a house), the applicant thereby had no entitlement to input credit in respect of the VAT paid by it on the charge for those initial works.
- In those circumstances, the applicant alleges that s. 4(6) of the VAT Act applies and supersedes any other relevant provisions and applies such that the applicant can avoid the normal VAT charge on the sales of developed sites to consumers - such sales being structured as a sale of a site (from the applicant), coupled with a building agreement (from Hansfield)."

10. To these contentions the applicant has put forward detailed arguments which are eloquently demonstrated in the affidavit of Brendan O'Byrne dated 22nd December, 2009 and filed in these proceedings. Judicial review is about procedure, in general, and I am making no choice as between the contending facts of this scheme.
11. On 29th May 2009, Commissioner O'Callaghan, having been explicitly asked to call the tax inspector that day, or to direct the Revenue Commissioner to make him available to the applicants, for cross-examination, refused. He gave the following ruling:-

> "Implicit [in the argument of counsel for the taxpayer] is that fact that various information was not in the inspector's possession at the point when he made the assessment and you then say he could not have had reason to believe. I know you were dealing with the best of judgments in the *Pegasus Birds* case but the distinctions are not that great I would suggest. The fact that appeals have to proceed on a certain basis all along doesn't mean that there not have been a flaw

in the way they were approached, having regard to the legislation but I don't see that there is such a flaw. I see there are dangers to which the taxpayer might be subjected by inspectors making assessment based on rather flimsy information but I am here to protect them. It seems to me that that is key point. As I mentioned earlier, in the *Kiely* case there was no such protection and the court struck down the case because the manner in which the evidence had been produced within the right to cross-examine the doctor who had given the certificate, perfectly logical and reasonable. In this instance, I do not believe that capricious assessments, if it was raised in such a fashion, would run fowl or could run fowl of the "have reason to believe" point.

In this instance I have no indication of any such capriciousness. I have an assessment which stills stands, which seems to be in numerical agreement with the submission made and, of course you say that it is bad for the various reasons you have advanced but there is nothing there that indicates that the original assessment made was anything other than made by somebody who had reason to believe that these were the amounts due.

The key point, as I started out by saying, is the fact that I don't believe an assessment has to made, following a perfected judgment. I think the process requires the assessment as soon as the inspector has reason to believe that there is tax due and he may have to subsequently refine his judgment when the facts come to light.

Implicit in your submission is the argument that the fact that it must all be in his possession. I don't agree with that as a matter of law. In that context I don't see that there is anything to be gained by cross-examining him or rather examining him, because I don't see that we can anywhere. I understand your submission clearly and I don't think there is anything there and accordingly I'm not going to and in fact I may not have power to do so, as [counsel on behalf of the revenue commissioners says, so I do not agree with [counsel for the taxpayer's] submissions on this point."

Jurisdiction of the Appeal Commissioners

12. Revenue law has no equity. Taxation does not arise by virtue of civic responsibility but through legislation. Tax is not payable unless the circumstances of liability are defined, and the rate measured, by statute. To import into taxation legislation any notion of general obligation is to return from the modern concept of precise obligation pursuant to defined legal rules into an era when feudal ties governed the relationship of those who served a monarch or lord and were in turn entitled to protection. How tax becomes payable, what exceptions avoid general liability as and when these genuinely arise, when payment is due, what records have to be maintained by taxpayers, which levels of taxation are applicable to what transactions or events and how the power of the tax collector is both defined and circumscribed are all precisely defined by modern legislation. In a similar way, what remedy that taxpayer has against a taxation demand is not general but specific. It is cut from the cloth whereby the precise liability is set by statute law and tailored individually by the legislature in the way that suits their perception of how an income tax, a corporation tax, a capital gains or acquisitions tax or a value added tax appeal should be set up as to the scope of appeal, the procedure on that appeal and the remedies available to the appellate body. In all relevant legislation in Ireland, appeal against a claim of taxation liability is to the Appeal Commissioners. But, as might be expected, that appeal is not always to be engaged in the same way. I turn now to the legislation. My focus is on whether the argument on behalf of the Revenue Commissioners that the Appeal Commissioners had no jurisdiction to call the inspector of taxes who raised the original estimate is valid. In doing so, I caution myself against the use of case law derived from United Kingdom provisions. That legislation uses different wording and thus seeks to import a different concept. In addition, decisions made by courts in that jurisdiction have introduced procedural rules on hearings on appeal from assessments which should not be thoughtlessly imported as an adjunct to our legislation. In the use of particular words, the Oireachtas is seeking to define tax liability in particular circumstances and, in the context of the proper conduct of an appeal, a precise form of jurisdiction.
13. Legislation must be seen in the context of the entirety of applicable provisions. It should not be deconstructed so that a phrase or subsection is taken out of the overall context of the legislative scheme whereby a particular purpose was being pursued. Words are to be given their ordinary or, where appropriate, technical meaning. The use of one particular form of words does not allow for its substitution by any other set of words which alters the concept that the legislation is conveying within the context of the legislative intent as deduced from the statute. While not being entitled to alter or ignore statutory words in order to prevent a provision from being unworkable, how an interpretation contended for might work out in practice may be part of the test from which the meaning of legislation is to be derived.
14. In this respect, I will not touch on any of the issues as between the parties before the Appeal Commissioners. They are not a matter for me.
15. Section 23 of the Value Added Tax Act, 1972, as amended, shown in square brackets, provides the relevant power to the Revenue Commissioners to raise an assessment:-

> "23(1) Where in relation to any period… [the inspector of taxes… has reason to believe] that an amount of tax is due and payable to [the Revenue Commissioners] by a person in any of the following circumstances:-

(a) The total amount of tax payable by the person was greater than the total amount of tax (if any) paid by him.
(b) The total amount of tax refunded to the person in accordance with s. 20(1) was greater than the amount (if any) properly refundable to him or
(c) An amount of tax is payable by the person and a refund under s. 21 has to been made to that person,

> Then without any prejudice to any other action which may be taken, [the inspector… may], in accordance with regulations but subject to s. 30, make an [assessment in one sum of the total amount of tax which in [his] opinion should be paid or the total amount of tax (including a nil amount) which in accordance with s. 20(1) should have been refunded, as the case may be, in respect of… such period and may serve a notice on the person specifying –

(i) The total amount of tax so [assessed],
(ii) The total amount of tax (if any) paid by the person or refunded to the person in relation to the said period, and
(iii) The total amount so due and payable as aforesaid (referred to subsequently in the section as "the amount due").
(2) Where notice is served on a person under subsection the following provisions shall apply:-
(a) The person may, if he claims the amount due is excessive, on giving notice to the Revenue Commissioners within the period of twenty one days from the date of the service of the notice, appeal to the Appeal Commissioners…"
16. As I have stated, the core argument on the appeal has concerned purchase and leasing transactions as between two related entities. An exemption from V.A.T., in that respect, may or may not arise under s. 4(4) or the Value Added Tax Act, 1972. This provides as follows:-

> "4(4) Where a person having an interest in a moveable goods to which this section applies disposes, as regards the whole or any part of those goods, of an interest which derives from that interest in such circumstances that he retains the reversion on the interest disposed of, he shall, in relation to the reversions so retained, be deemed, for the purposes of s. 3(1)(f), to have made an appropriation of the goods or of the parts thereof, as the case may be, for a purpose other than

the purpose of his business."

17. Section 933 of the Taxes Consolidation Act 1997 provides for appeals of income tax or corporation tax. Section 934 provides that appeals in relation to those taxes are to be heard and determined by the Appeal Commissioners, and that their determination on any such appeal shall be final and conclusive, barring an appeal by way of rehearing to the Circuit Court or a case stated for the opinion of the High Court. Under s. 25 of the Value Added Tax Act 1972, as amended, a person aggrieved by a determination of the Revenue Commissioners may appeal in like manner to that provided for under the 1997 Act. Specialised delineations such as registration as a V.A.T. agent, or for companies to be treated as a group for V.A.T. purposes, are specifically provided for.
18. These appeals may be taken by any "person aggrieved by a determination" in that regard. An appeal in respect of an assessment for V.A.T. is also provided for; but only on the grounds that "the amount due is excessive". It is noteworthy that, in contrast, decisions in respect of taxable status by a "person aggrieved" are specifically appealable.
19. Under s. 25(2) the provisions set out as to appeals in the Taxes Consolidation Act 1997, are applied as to "the hearing and determination of an appeal by the Appeal Commissioners…" By s. 25(2) of Value Added Tax Act, 1972, the provisions of the Income Tax Acts, which has now become the Taxes Consolidation Act, 1997, are applied to appeals in V.A.T. matters. That, however, is "subject to the modifications set out" within that section and "to other necessary modifications". This means that an appeal in respect of V.A.T. is not to be construed as being founded necessarily on the same jurisdiction as in income tax or corporation tax. But, otherwise the hearing is to as if the appeal were an appeal against an assessment of income or corporation tax. It is also noteworthy that whereas s. 933 of the Taxes Consolidation Act 1997 allows a person "aggrieved by any assessment to income or corporation tax made on that person by the inspector" to appeal to the Appeals Commissioners, the power of appeal provided for in s. 23(2) of the Value Added Tax Act 1972 is in respect of a person who "claims that the amount due is excessive". In hearing that appeal, the Appeal Commissioners are exercising the jurisdiction conferred by s. 934 of the Taxes Consolidation Act 1997. Bearing in mind that the appeal is subject to the exact wording of the Value Added Tax Act, 1972, I now set out section 934, dealing with procedure on appeals, in full:-

> "934(1) The inspector or such other officer as the Revenue Commissioners shall authorise in that behalf (in this section referred to as "other officer") may attend every hearing of an appeal, and shall be entitled

(a) to be present during all the hearing and at the determination of the appeal,
(b) to produce any lawful evidence in support of the assessment, and
(c) to give reasons in support of the assessment.

> (2) (a) On any appeal, the Appeal Commissioners shall permit any barrister or solicitor to plead before them on behalf of the appellant or the inspector or other officer either orally or in writing and shall hear

(i) any accountant, being any person who has been admitted a member of an incorporated society of accountants, or
(ii) any person who has been admitted a member of the body incorporated under the Companies Act, 1963 , on the 31st day of December, 1975, as The Institute of Taxation in Ireland".

> (b) Notwithstanding paragraph (a), the Appeal Commissioners may permit any other person representing the appellant to plead before them where they are satisfied that such permission should be given.
> (3) Where on an appeal it appears to the Appeal Commissioners by whom the appeal is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand.

(4) Where on any appeal it appears to the Appeal Commissioners that the person assessed ought to be charged in an amount exceeding the amount contained in the assessment, they shall charge that person with the excess.
(5) Unless the circumstances of the case otherwise require, where on an appeal against an assessment which assesses an amount which is chargeable to income tax or corporation tax it appears to the Appeal Commissioners
(a) that the appellant is overcharged by the assessment, they may in determining the appeal reduce only the amount which is chargeable to income tax or corporation tax,
(b) that the appellant is correctly charged by the assessment, they may in determining the appeal order that the amount which is chargeable to income tax or corporation tax shall stand, and
(c) that the appellant ought to be charged in an amount exceeding the amount contained in the assessment, they may charge the excess by increasing only the amount which is chargeable to income tax or corporation tax.

> (6) Where an appeal is determined by the Appeal Commissioners, the inspector or other officer shall give effect to the Appeal Commissioners' determination and thereupon, if the determination is that the assessment is to stand or is to be amended, the assessment or the amended assessment, as the case may be, shall have the same force and effect as if it were an assessment in respect of which no notice of appeal had been given.
> (7) Every determination of an appeal by the Appeal Commissioners shall be recorded by them in the prescribed form at the time the determination is made and the Appeal Commissioners shall within 10 days after the determination transmit that form to the inspector or other officer

20. Under the Value Added Tax Act, 1972 the burden of proof "that the amount due is excessive" rests on the taxpayer. This reversal of the burden of proof onto the taxpayer is common to all forms of taxation appeals in Ireland. Powers are given to the inspector to be present, to produce evidence and to give reasons in support of the assessment. The Appeal Commissioners, if the taxpayer proves over-charging, must abate or reduce the assessment accordingly, but otherwise an order must be made that the assessment shall stand. The Appeal Commissioners are also given the power to charge the taxpayer to tax in an amount exceeding that contained in the assessment. So, their powers indicate that the amount due may go up or down or remain the same. Where a power is given to appeal a ruling, such as registration for V.A.T. purposes, the person "aggrieved", the relevant appeal jurisdiction in that case, may have that decision reversed on appeal. That, to my mind, is part of the necessary modification of the appeals procedure introduced in dealing with V.A.T. liability. It is what the legislature had in mind is setting the parameters of the jurisdiction. Appeals as to the "amount assessed" only arise where a V.A.T. assessment is raised. This is another necessary modification of the jurisdiction of the Appeal Commissioners on hearing an appeal.
21. I turn now to the general jurisdiction, as opposed to that specific to V.A.T., exercised when a taxpayer appeals. The function of the Appeal Commissioners on the appeal is conveniently stated by Lord Heward L.C.J. in *Sneath's* case 17 T.C. 149 at 493:-

> "I may note here at once that in making the assessment and dealing with the appeals, the commissioners are exercising statutory authority and a statutory duty which they are bound to carry out. They are in the position of judges deciding in

> issue between two particular parties. Their obligation is wider than that. It is to exercise their judgment on such material as comes before them and to obtain any material which they think is necessary and which they ought to have on that material to make the assessment or the estimate which the law requires them to make. They are not deciding a case *inter parties*, they are assessing or estimating the amount on which in the interests of the country at large, the taxpayer ought to be taxed".

22. In deciding such issue as the relevant taxation legislation puts before the Appeal Commissioners, under s. 939 of the Taxes Consolidation Act 1997, the Appeal Commissioners have the power to summon "any person whom they think able to give evidence before them as respects an assessment made on another person"; any person confidentially employed by the taxpayer, like an accountant, is to examined in the same manner as the person chargeable. In other words, any contract of confidence, or expectation of confidence by reason of the relationship of taxpayer and tax advisor, is removed. In exercising that power on an appeal of an assessment by a tax inspector that an amount of V.A.T. is due, however, unlike in an income or corporation tax appeal, the Appeal Commissioners are limited by the legislation to scrutinising the amount of V.A.T. due. I feel compelled to read the legislation as drawing that distinction. The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable. The absence of mutuality in this form of appeal procedure is illustrated by the decision of Gilligan J. in *T.J. v. Criminal Assets Bureau,* [2008] IEHC 168. While the appeal in question there concerned income tax, the observations made in the course of the judgment as to the nature of a tax appeal are germane to deciding this issue. The applicant in that case was assessed for income tax by a tax inspector assigned to the Criminal Assets Bureau. He was assessed to tax on a large amount of income from apparently mysterious sources. Invoking his statutory right of appeal in those circumstances, the applicant sought disclosure of all information on which the assessment was made. Referring to the Revenue Customer Service Charter, the court noted that there was a self-imposed obligation on the Revenue Commissioners to give all relevant information whereby the taxpayer would understand his tax obligations. This did not extend, it was held by Gilligan J., to making an order for discovery. In taking the appeal, the taxpayer was undertaking the burden of appeal within the relevant formula as to the relief which he might be granted if successful. At para. 50 Gilligan J. stated:-

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

23. To call in aid the tax inspector is, within the context of a V.A.T appeal, to undermine the twin pillars of scheme of self assessment and the taxpayer bearing the burden of proof that is common to both income tax and value added tax appeals. Of itself, this would not decide the point. The actual wording of the jurisdiction to appeal only the excessive nature of the amount assessed is much more central. It determines this point.
24. By way of further contrast between the Taxes Consolidation Act 1997 powers of appeal in relation to income and corporation tax to appeal if aggrieved as a taxpayer, as compared to those set out in ss. 23 and 25 of the Value Added Tax Act 1972 to appeal amount, where an assessment to liability is made, I turn to the legislation of the neighbouring kingdom. I note that under the Value Added Tax Act 1994 of the United Kingdom, that s. 83 allows for an appeal to a tribunal in respect of either "an assessment… or the amount of such an assessment".
25. In *Van Boeckel v. The Customs and Excise Commissioners,* [1981] S.T.C. 290, Woolf J. was of the view that tax commissioners, who are equivalent to our tax inspectors, should make "all reasonable investigations before making an assessment". Under the English legislation, those assessing the tax are to act "to the best of their judgment". This applies, as the legislation requires, both to assessing the amount of tax due under V.A.T. liability and raising an assessment in the first place.
26. There is no doubt on the decided cases, within the context of that entirely different United Kingdom legislation, that both the amount of value added tax assessed and the validity of the assessment made in the first instance, may be appealed to the appropriate United Kingdom body, which, in that jurisdiction, is a tribunal. The operative wording as to the jurisdiction of that tribunal on appeal is derived from s. 73(1) of the Value Added Tax Act, 1994. The entitlement of the tax commissioners to raise an assessment arises where there is an absence of documents kept by the taxpayer, or the taxpayer failing to afford the facilities necessary to verify relevant returns, or where it appears that the returns made by the taxpayer are incomplete or incorrect. Then, the amount of V.A.T. due from the taxpayer is to be assessed by the commissioners "to the best of their judgment". The wording in the Irish Act is entirely different. It speaks of the tax inspector having "reason to believe" that an amount of tax is due and payable and, then, of making an assessment. Such different wording should never be conflated. The tribunal on appeal in the neighbouring kingdom, in exercising the relevant powers of assessment as to the amount, and in ruling on the issue as to whether the tax commissioners were wrong to raise the assessment in the first instance, are entitled to hear the commissioners. Woolf J. has developed a limited jurisdiction whereby the commissioner raising an assessment might be called. This question as to the validity of a judgment by a tax commissioner to raise an assessment in the first place, however, was generally to be heard as a preliminary issue. At para. 38 of the judgment Woolf J. stated:-

> "In light of the above discussion, I would make four points by way of guidance to the tribunal when faced with "best of their judgment" arguments in future cases:

(i) The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material property available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioner's exercise of judgment at the time of the assessment.
(ii) Where the taxpayer seeks to challenge the assessment as a whole on "best of their judgment " grounds, it is essential that the

grounds are clearly and fully stated before the hearing begins.
(iii) In particular the tribunal should insist at the outset that any allegation of dishonesty or other wrongdoing against those acting for the commissioners should be stated unequivocally; that the allegation and the basis for it should be fully particularised; and that it is responded to in writing by the commissioners. That tribunal should not in any circumstances allow cross-examination of the Customs officers concerned, until that is done.
(iv) There may be a few cases where a "best of their judgment" challenge can be dealt with shortly as a preliminary issue. However, unless it is clear that time will be saved thereby, the better course is likely to allow the hearing to proceed on the issue of amount, and leave submissions on failure of best of their judgment, and its consequences to be dealt with at the end of the hearing."
27. I would not be prepared to import these procedural rules as they arise entirely within the context of the United Kingdom legislation. Dealing with this issue in explicit terms and particularising why the tax commissioners ought to be called emphasises the time element in taxation appeals. I will return to that point. Respecting, as I do, the judgment of Woolf J., this markedly contrasting British legislation strengthens the view that I have formed that there is no jurisdiction in the Appeal Commissioners in Ireland on a V.A.T. appeal to enter into an enquiry as to whether the inspector in raising the assessment failed to act on the basis of having "reason to believe" but was, instead, acting without good faith, or in circumstances that were capricious or amounting to a factually unsustainable view, or was acting unreasonably. I turn now, in an attempt to define or at least elucidate it, to the actual wording in question that allows a tax inspector to raise and assessment of liability to V.A.T.
28. Under s.23(1) of the Value Added Tax Act, 1972 the inspector of taxes may proceed to assess tax act where he or she "has reason to believe that an amount of tax is due". In using the word "believe" as opposed to words such as "conclude" or "suspect", a very wide form of jurisdiction is implied. In the course of his judgment in *Hanlon v. Fleming*, [1981] I.R. 489, Henchy J. had to consider the wording of criminal statute from England and Wales in relation to receiving stolen goods, whereby the wrong was committed where the accused handled stolen goods "knowing or believing the same to be stolen goods". He emphasised that knowledge was different to belief. At p.497 he offered the following observation:-

> "In dealing with the arguments propounded in this case I am not entitled to analyse or interpret the Theft Act, 1968. I must focus my attention on the words "knowing or believing the same to be stolen goods" and first consider whether a conviction under s. 33, sub-s. 1, of the Act of 1916 which contained those words would be good. I am satisfied that it would not. Apart from the fact that it might be held bad for duplicity, it would indicate that the jury may have found the mens rea to be something less than actual knowledge that the goods had been stolen; that would be in the teeth of s. 33, sub-s. 1, of the Act of 1916 and the judicial decisions under it.
>
> While knowledge and belief frequently coincide or overlap (for example, I both know and believe that this is the Supreme Court), there are many matters which one may believe to be correct without being able to say that one knows them to be correct. For example, I may believe that there is life in outer space, that evolution is the origin of species, that a particular person did a particular act, but I may have to admit that I do not know, or do not know with any substantial degree of certainty, that such beliefs are well founded. Without entering into the intricate logical, metaphysical and philosophical problems involved in a comparison of knowledge with belief, and keeping the matter on the plane of ordinary usage (which is, presumably, how it would be dealt with by both judge and jury), I would point to the commonly used expression "I believe it to be so, but I do not really know."
>
> If a person were being tried for the offence of receiving goods "knowing or believing the same to be stolen goods," contrary to s. 33, sub-s. 1, of the Act of 1916, the judge when charging the jury, would not be entitled to tell them to ignore the words "or believing" in the indictment and in the issue paper; nor, if a conviction ensued, could they be ignored in the warrant. As appears from a consideration of the Criminal Justice (Administration) Act, 1924, and the rules and forms annexed thereto, the fact of the matter is that the introduction into the indictment of the words "or believing" would invalidate the indictment and, thereby, a consequent conviction. The introduction of those words as an ingredient of the offence would amount to an unconstitutional amendment of s. 33, sub-s. 1, of the Act of 1916 for it would allow a dilution or relaxation of the mens rea required by that sub-section."

> "While knowledge and belief frequently coincide or overlap (for example I both know and believe that this is the Supreme Court), there are many matters which one may believe to be correct without being able to say that one knows them to be correct. For example, I may believe that there is life in outer space, that evolution is the origin of species, that a particular person did a particular act, but I may have to admit that I do not known or do not know with any substantial degree of certain, that such beliefs are well-founded. Without entering into the intricate logical, meta-physical and philosophical problems involved in a comparison of knowledge with belief, and keeping the matter on the plain of ordinary usage (which is, presumably, how it would be dealt with by both judge and jury), I would point to the commonly used expression "I believe it to be so, but I do not really know".

29. The Oireachtas did not use the phrase "reason to conclude" in the legislation. A conclusion is at higher level of certainty than a belief. If I were required to put states of mind commonly used in law as defining liability or for allowing administrative action in descending order of certainty, they would be, from the top rung, to know; to conclude beyond reasonable doubt; to conclude as probable; to reasonably suspect; and I would tend to put mere suspicion and mere belief, without the element of legally required reasonableness, on the same level at the lowest rung. Modern legislation tends not to use those bare concepts of belief or suspicion, instead legislation may refer to someone knowing or believing in respect of criminal liability, such as in handling stolen property believing it was probably stolen or dealing in the proceeds of crime with a similar mental element, and in administrative statutes the wording tends to revolve around conclusions or beliefs based on some reason or on suspicion reasonably arising. In any event, unreasonable actions or decisions, that is those that fly in the face of fundamental common sense, exceed jurisdiction either on a quasi-judicial or an administrative level. I note that the Concise Oxford English dictionary (10th Ed., 2002) says of conclude that it means to "arrive a judgment or opinion by reasoning". In using the lesser phrase of "reason to believe", it is clear that the approach of the tax inspector cannot be based upon telepathy or a mere hunch unrelated to any basis upon which a reasonable person might thereby come "to believe that an amount of tax is due and payable" by the taxpayer. The same dictionary defines reason as a "cause, explanation, or justification". Thus, the tax inspector must have a cause, an explanation or a justification to believe, not to conclude, not to know, that an amount of tax is due. He or she does not have to form a concluded belief in that regard, much less a final conclusion or to arrive at a state of knowledge about the fact that tax is due. What is required is that any tax inspector should act only where their belief is backed up by reason. In attempting to describe the notion of having a reason to believe something, the exclusion of its opposite of caprice goes some way towards assisting in the definition. Simple words are ordinary because they carry a meaning. We can understand words both for they are, and for what they are not. In raising an assessment on a taxpayer for an amount of V.A.T., any notion of mere belief is ruled out. Perhaps this is because that would be an utterly burdensome test from the point of view of a taxpayer who is then faced with proving that an amount of tax is not due and payable; whereas any notion of conclusion is also excluded as being inappropriate as to how tax inspectors operate in the context of the necessary administrative function of collecting on behalf of the State such tax as is due. A tax appeal is burdensome, to be sure, but not simply for the taxpayer, as this lengthy appeal replete with exquisite legal argument illustrates. That is not the only consideration. An inspector of

taxes is not going to be kept in a position of perfect illumination about their affairs by every single taxpayer. As between reality, experience and the burden inherent in embarking on an appeal, some sense of balance must be achieved. It is for the Oireachtas to draw that balance and, in using that particular wording, allowing for an appeal in V.A.T. assessments on excessive amount only, that then is the balance that has been struck. In so far as my remarks differ as to the analysis of the relevant legislation from those Ó Néill J. in *Viera v. The Revenue Commissioners,* [2009] IEHC 431, I have taken that decision into account in coming to the conclusion that I have reached and, indeed, must refer to the case later on a point where my views coincide with those of Ó Néill J.
30. A further argument arises. It is said that inherent in the powers of the Appeal Commissioners are not just the ability to reduce a liability to V.A.T. but to remove it entirely. Thus, it is contended, the tax inspector, if he is shown to be wrong, will have raised an assessment wrongly and it should be struck down on appeal. This would, it is argued, amount to removing the liability and not just to removing it. Since the powers of the Appeals Commissioners on such an appeal in a V.A.T. matter are in part set out in s. 934(3) of the Taxes Consolidation Act, 1997, I now quote that:-

> "(3) Where on an appeal it appears to the Appeal Commissioners by whom the appeal is heard, or to a majority of such Appeal Commissioners, by examination of the appellant on oath or affirmation or by other lawful evidence that the appellant is overcharged by any assessment, the Appeal Commissioners shall abate or reduce the assessment accordingly, but otherwise the Appeal Commissioners shall determine the appeal by ordering that the assessment shall stand."

31. A general observation may be made that little is added, certainly nothing that takes away from the special jurisdiction on appeal in a V.A.T. matter. In that regard I am influenced by the decision of O'Byrne J. in *The State (Whelan) v. Smidic* (1938) ITR 571 at 579. He had this to say in relation to the powers of the Appeal Commissioners which were then called Special Commissioners:-

> "What, then, are the powers of the Special Commissioners on the hearing of an appeal against an assessment? Various ancillary powers are conferred upon the commissioners for the purpose of enabling them to exercise the very important function of hearing and determining appeals but, in so far as the final determination of the appeal is concerned, I am of opinion that there only powers are those contained in ss. 137(4) and (5) of the Act of 1918: they may abate, reduce or increase the assessment and, subject to such abatement or variation, the assessment stands good. I am therefore of opinion on an analysis of the material sections of the statutes, that the final determination of these Special Commissioners, on the hearing of an appeal against an assessment, must necessarily be in order directing

(1) that the assessment shall abate altogether or
(2) that it be varied by increasing or diminishing it to a definite amount to be fixed by them, or
(3) that the appeal be dismissed, in which event the original assessment stands good.
32. The Concise Oxford English dictionary does not support the view that by using two words side by side in terms of ameliorating the effect of an assessment, that the Oireachtas thereby intended, within the specific context of the right of appeal as to amount only in relation to an assessment of V.A.T. liability, that the Appeal Commissioners should have power to strike down the assessment, as well as reducing the amount. Two meanings are given in relation to the word "abate" in that dictionary:-
"1. (Of something bad) become less intense or widespread.
2. Law reduce or remove (a nuisance).

33. On the other hand, "reduce" is defined as to "make or become smaller or less in amount, a degree or size". A nuisance may be abated, in the sense that it may be removed, or reduced to the degree that it is no longer a nuisance in law. Then the nuisance ceases to exist. The cause of action is removed. A reduction, on the other hand is defined by my dictionary as to "make or become smaller" or, in other words, less in amount, degree or size.
34. With the absence of equity in taxation law, liability and the manner of proceeding in raising tax and procedures on appeal depending upon the precise wording of a statute, it is clear that the Appeal Commissioners must be given the power to entirely remove liability to pay under the assessment and not merely to reduce it. That is my view as to why two words are used. I note, however, the common legal habit of over pleading and pleading in multiple alternatives. Here is an example: in suing in relation to a check being refused in front of a man's friends following a meal in a posh hotel, implying inability to meet debts, lawyers will often plead that liability to pay damages would arise in law due to breach of duty, breach of contract, negligence and that defamation of the plaintiff occurred as well. However, I must generally presume that a statute does not use surplus words, though sometimes I wonder.
35. An assessment of V.A.T. under s. 23 of the Value Added Tax Act, 1972 gives rise to a difficulty for the taxpayer. That difficulty, however, is imposed by the Oireachtas within a context of the tax inspector having "reason to believe that an amount of tax is due and payable" to the State. The Oireachtas has formulated wording whereby an appeal can be taken only in respect of amount. A taxpayer engages the burden of proving that tax is not due, on taking that appeal, but within a context of a hearing which is not hide-bound by regulation but rather looks to enquire into the truth of taxation liability. Within that context, where no tax is due, or where the amount should be reduced, the exercise undertaken by a taxpayer who complies with the rules in relation to record keeping could not be regarded as especially burdensome before a tribunal which has always shown itself to be both expert and open-minded.
36. Finally, I am influenced, but it is not decisive on this issue, that with the passage of four years, the original assessment cannot again be raised. In that regard an assessment of V.A.T. cannot be raised four years after the amount becomes due, absent, neglect or fraud; see s. 30 of the Value Added Tax Act, 1972. I quote this below. There is no question but that the advisors on behalf of the applicant acted in good faith in relation to this matter. They were not out to delay matters. A situation could easily arise, however, where this point was raised in passing, without an explicit demand for the inspector to be called that day or on a named day proximate to it, in the context of a lengthy hearing and, as happened here, four years had passed before any application in terms was made to call the inspector of taxes. If he was then called and slipped up in the manner of his evidence, or if he died in the meantime, or became too ill to give evidence or could not at all remember the details of the file, the taxpayer appealing might argue for a free exemption from taxation liability. There is nothing in the legislation which leads me to believe that the Oireachtas ever even contemplated the bizarre situation akin to those which sometimes arise in those circumstances following on the arrest of an individual for serious crime, much less ever intended it. To pursue such a policy would strike at the good order inherent in the rational scheme of taxation collection which I am satisfied exists in this context for the good of the State. I also think that were a tax inspector to be unavailable, for whatever reason, in any appeal where calling him was within the jurisdiction of the Appeal Commissioners, and was necessary, that the relevant state of mind could be inferred from circumstances. That is what happens in criminal law where the intent, or state of knowledge, or recklessness, or objective state of criminal negligence is inferred from the circumstances proven. The contrary, where because the arresting Garda is no longer available, a detention becomes unlawful, is untenable in any rational taxation system. I mention this because it might arise that a tax inspector is unavailable when the point is raised that no one else could take his or her place and the documentary evidence might be insufficient to supply the absence.

<u>Available Remedy</u>
37. There is an appropriate remedy to a person who claims that he is being assessed to V.A.T. in circumstances where he says that the tax inspector had no "reason to believe that an amount of tax is due and payable", within the meaning of s.23(1) of the Value

Added Tax Act, 1972. That remedy is judicial review of administrative action. If there are circumstances upon which it may be argued that such an assessment was arrived at capriciously, unreasonably or in bad faith, then an applicant may seek a declaration that the notice of assessment is invalid; that the assessment be quashed; or that an injunction be issued to prevent its operation. In *Viera v. The Revenue Commissioners,* [2009] IEHC 431 the applicant sought judicial review in respect of a notice of assessment to Value Added Tax in the sum of €3,085,025, raised by the Revenue Commissioners in December, 2006. The nature of the argument advanced was that the relevant sum could not be demonstrated by the Revenue Commissioners to be due and payable in the context of the case. Precise details as to taxation activity, it was said, as in this case, were still being sought by the Revenue Commissioners some months after the assessment. A contended for absence of calculations of the tax due and payable was said to undermine statements in the tax assessment that there was reason to believe that tax was due. The judgment of Ó Néill J. involved looking at the contentions, first of all, of the applicant, and then considering what material was set out in the affidavit so as adjudicate whether there was "reason to believe" that tax was due. I quote the following paragraphs from the judgment of Ó Néill J.:-
"I note that in this case that all the information furnished to Mr. O'Brien was from the applicant company itself. As noted above, the audit on the applicant company was brought about on foot of applying for a refund of corporation tax for the year ended the 31st August, 2004. Mr. O'Brien held a director's report and financial statements for the year ended the 31st August, 2004 which also included figures from the preceding financial year. These documents were submitted by the company in respect of the application for a refund. Mr. O'Brien also held the VAT returns made by the company which included details of their gross sales figures. Mr. O'Brien's file note of the meeting of the 23rd August, 2005, as exhibited in his affidavit sworn on the 22nd October, 2007, details the documents that were made available to him at the meeting as *"the audit trail, nominal* [bank] *accounts, linking papers and the* [financial] *records"*. At para. 12 of his affidavit sworn on the 22nd October, 2007, he avers that it was explained to him that VAT had not been charged on the sales of undeveloped sites, as opposed to houses. He found that this was in order and excluded those sales from his consideration. In the meeting of the 6th October, 2005, Mr. O'Brien was furnished with a sample licence agreement. His file note of the 6th October, 2005, states as follows:-

> *"I had a look at the records for 2002/2003 and sample checked the details with the returns and agreed these.*
>
> …
>
> *The use of licence agreements commenced in Mar 03 and 79 transactions took place in this to y/e 31/08/03. This would equate to the difference of over €8 million between the VAT returns and the accounts."*

Therefore, at the time the assessment was raised in December, 2006, Mr. O'Brien held the financial returns and accounts for the financial years ending the 31st August, 2002, 2003 and 2004. He possessed information as to the overall sales figures and the amount of VAT the applicant company had paid and the sales of undeveloped sites. On the basis of the information before him and the interviews he had with representatives and advisors of the applicant company, Mr. O'Brien concluded that the licence agreements were a device to avoid VAT. Consequently, in my judgement, he had ample *"reason to believe"* that an amount of tax was due and payable by the applicant, which he was able to calculate by reference to the extensive aforementioned financial material. I am satisfied that the volume and quality of information available to Mr. O'Brien would also satisfy the test proposed by the applicant, namely, of having an opinion that was *bona fide*, factually sustainable and not unreasonable."
38. This remedy of judicial review would have been available to the applicant to explore the contention that is made that the tax inspector never had reason to believe that an amount of V.A.T. was due and payable by Menolly Homes Limited. I note that in taking such an application that it would be more logical in the context of s. 30 of the Value Added Tax Act, 1972 that it be taken within the time limits set down for judicial review in Article 84 of the Rules of the Superior Courts. This is six months for *certiorari* and three months for all other remedies. In the context of the need of State to collect tax due, it is difficult to see how these ample time limits could routinely be extended.

Cross-examination
39. I turn now to the issue of cross-examination. Within what was obviously a careful reading of the relevant legislation, and in a context where the entire of the evidence was considered, the first respondent Appeal Commissioner ruled that there had been no capricious assessment that would run foul, or could run foul, of the contention that the Revenue Commissioners had no "reason to believe" that an amount of V.A.T. was due and payable. The Appeal Commissioner indicated that there was no indication of capriciousness. Instead he ruled that there was nothing to indicate that the assessment to liability to V.A.T. by the tax inspector was made by anyone other than someone who had reason to believe that the relevant amounts were due. This was, in my view, a ruling within jurisdiction.
40. My views as to the nature of cross-examination as an aid to an administrative process have been set out fully in *J and E Davy trading as Davy v Financial Services Ombudsman Ireland and the Attorney General,* [2008] IEHC 256. There is no point in repeating herein what I have already decided in that case, especially as the matter is under appeal to the Supreme Court which has reserved decision on the matter in July 2009. A decision by a person exercising quasi-judicial authority not to allow cross-examination of a particular witness, or not to allow an oral hearing on a particular issue, in that context, is subject to judicial review. The review can only arise, however, where the decision made on a particular point not to allow cross-examination or the raising of an issue by oral evidence, is unreasonable. As to whether cross-examination should be allowed or not is within the jurisdiction of the administrative officer exercising a *quasi* -judicial function. The test, as I saw it, in the *Davy* case was whether that process of calling and examining a witness was necessary for a fair adjudication of the issues in question. At para. 38 of the judgment, I said:-

> "Where there is a requirement that an oral hearing should take place then, in the context of the statute requiring informality and expedition, that oral hearing must be expressly limited to the examination of those witnesses whose testimony is inescapably necessary for the purpose of resolving a disputed issue of fact which cannot otherwise be fairly decided. Some guidance, in that regard, is provided by the judgment of the Court of Appeal in England and Wales in *Heather, Moor and Edgecomb Ltd. v. Financial Ombudsman Service and Simon Lodge* **[**2008] EWCA Civ 642 . The relevant English Act is the Financial Services and Markets Act 2000. This contains similar provisions allowing for a ruling to be made against a financial service provider on the basis of a breach of the law, or on what might loosely be termed a fairness basis. That Act also requires the Ombudsman to pursue a complaint with expedition and with a lack of formality. Article 6 of the European Convention on Human Rights provides for an oral and public hearing of civil and criminal cases. However, there may be proceedings at which no oral hearing is required as, for instance, where there are no issues of credibility or no contested facts which necessitate a hearing. In those instances, a tribunal may fairly and reasonably decide a case on a review of the written materials and on hearing oral submissions, or by receiving written submissions; *Jussila v. Finland* (2007) 45 E.H.R.R.39. At para. 65 of his judgment in the *Simon Lodge* case, Lord Justice Burnton stated:
> "There are a number of similarities between *Jussila v. Finland* and the present case. As in that case, the purpose of the request for an oral hearing was cross-examination, which in that case and in this the tribunal reasonably found to be unnecessary. The Court accepted that 'demands of efficiency and economy' may justify a lack of a public hearing; in the present case, the Court is concerned with a scheme 'under which . . . disputes may be resolved quickly and with minimum formality', a consideration that justifies holding a public oral hearing only when that is necessary fairly to determine the dispute in question.""

41. In this legislation, unlike the legislation setting up the Financial Services Ombudsman, there is no expressed requirement of dealing with matters "in an informal and expeditious manner". However, expedition and concision are good rules of thumb for any administrative tribunal and for courts too. The procedures of civil plenary hearings, as imported to tribunals of inquiry under the Tribunals of Enquiry Acts, 1992-2004 have led to lengthy, contentious and burdensome hearings. They involve the distribution of sometimes hundreds of thousands of documents to multiple parties at potential risk of being adversely commented upon as to their reputation, cross-examinations that may amount almost to interrogations, lasting days, if not weeks, and the over-complication of issues whereby relevance is argued to be the most elastic of concepts. The consequence is a wait of years for a decision by way of written report. That result is also an almost impossible burden borne by the tribunal body which is supposed, of its nature, to be investigative as well as adjudicatory. Administrative bodies, tribunals and courts are entitled to make decisions: there is no issue of fact that cannot be decided fairly on the papers; this issue is not relevant to the point under adjudication; this cross-examination is not helping to elucidate the truth, rather it is causing confusion; the pursuit of this issue will not assist in my adjudication. They should be open to persuasion in the other direction, but that does not remove their responsibility to control a hearing fairly. A reasonable level of trust should be reposed in the decision-maker to act sensibly and judicially.
42. At para. 70 of the *Davy* decision I referred to a power within the administration of an adjudication by the Financial Services Ombudsman to review the papers and decide whether any form or oral hearing is necessary. That hearing, as I have indicated, is only required where there is an issue of fact which cannot fairly be resolved without hearing the parties. In this instance, the papers may well have been sufficient for the Appeal Commissioners to come to the view that such a hearing would be pointless. There was no contested issue of fact as between opposing witnesses, as evidenced from their written statements, unlike in the *Davy* case. There was an attempt to make an issue of fact through cross-examination. While that can be legitimate, it is within the scope of an administrative officer to rule on whether an issue requires cross-examination. It is within his jurisdiction to adjudicate that objectively the point could not arise.
Here, the point did not arise. The reasoning was that no hint was given of capriciousness or absence of belief based upon reason. That being a decision reasonably arrived at, the decision of the Appeal Commissioner not to allow cross-examination was made within jurisdiction. Again, I would caution against any tendency towards applying rules of civil plenary procedure within an administrative context in an unthinking or uncircumcised way. If any examination or cross-examination is required, the particular point involving a conflict of evidence, or whereby a genuine issue is raised as to the absence of evidence, or absence of a sufficiency of evidence, should be identified. Only such witnesses as are necessary to deal with that should be called for cross-examination. The process of examination and cross-examination should not be allowed to get out of bounds. It should be borne in mind that, for instance, taking a snippet of a sentence from a witness's statement out of the context of a paragraph may be grossly unfair. As I said in *Davy*:-
"The process of examination and cross-examination should not be allowed to get out of control. In recent times, the Commercial Court has adopted a procedure of often taking the witness statement of a party as evidence in chief and of proceeding directly to cross-examination. It may be necessary in some few instances to allow the party presenting the witness for cross-examination to ask some additional questions by way of clarification. Those cross-examining can be expected to be concise, to be polite and to be professionally efficient. Cross-examination may be curtailed by reason of prolixity; it may be corrected where it oversteps the mark of a good advocate in terms of politeness and instead becomes rude; it may be restricted on matters of credit to those issues which bear a real relationship to the matter in issue; and it should be controlled so that it assists in the exercise of finding the truth."

Discretion
43. I have found against the applicant in relation to the substantive points in this appeal. By reason of the fact, however, that under s. 30 of the Value Added Tax Act, 1972 any assessment to Value Added Tax Liability cannot be raised, absent neglect or fraud, four years after incurring the liability, this application has been brought far too late. I have referred to that statutory rule already in this judgment and I now quote that section, as amended:-

"30(1) Subject to subsection (3) and sections 26 (4) and 27 (6), proceedings for the recovery of any penalty under this Act may be commenced at any time within six years next after the date on which it was incurred.

(2) Where the person who has incurred any penalty has died, any proceedings under this Act which have been or could have been commenced against him may be continued or commenced against his personal representative and any penalty awarded in proceedings so continued or commenced shall be a debt due from and payable out of his estate.

(3) Proceedings commenced by virtue of subsection (2) may be begun at any time not later than three years after the expiration of the year in which the deceased person died in a case in which the grant of probate or letters of administration was made in that year and at any time not lens: than two years after the expiration of the year in which such grant was made in any other case, but the foregoing provisions of this subsection shall have effect subject to the proviso that where the personal representative lodges a corrective affidavit for the purpose of assessment of estate duty after the year in which, the deceased person died, the proceedings may be begun at any time before the expiration of two years next after the end of the year in which the corrective affidavit was lodged.
(4) (a) (i) In relation to any taxable period ending [1 May 2003] an estimation or assessment of tax under section 23 or 23 may, subject to subparagraph (ii) be made at any time not later than [six years] after the end of taxable period to which the estimate or assessment relates or, where the period in respect of which the estimate or assessment is made consists of two or more taxable periods, after the end of the earlier or earliest taxable period comprised in such period.
(ii) In relation to any taxable period commencing on or after [1 May 2003] and on or after [1 January 2005], in relation to any other taxable period, an estimation or assessment of tax under section 22 or 23 may be made at any time not later than [four years] after the end of the taxable period to which the estimate or assessment relates or, where the period in respect of which the estimate or assessment is made consists of two or more taxable periods, after the end of the earlier or earliest taxable period comprised in such period

(aa) Notwithstanding paragraphs (a)(i) and (a)(ii) in a case in which any form of fraud or neglect has been committed by or on behalf of any person in connection with or in relation to tax, an estimate or assessment as aforesaid may be made at any time for any period for which, by reason of the fraud or neglect, tax would otherwise be lost to the Exchequer.

(b) In this subsection "neglect" means negligence or a failure to give any notice, to furnish particulars, to make any return or to produce or furnish any invoice, credit note, debit note, receipt, account, voucher, bank statement, estimate, statement, information, book, document, record or declaration required to be given furnished made or produced by or under this Act or regulations:

Provided that a person shall be deemed not to have failed to do anything required to be done within a limited time if he did it within such further time, if any, as the Revenue Commissioners may have allowed; and where a person had a reasonable excuse for not doing anything required to be done, he shall be deemed not to have failed to do it if he did it without unreasonable delay after the excuse had ceased.

(5)(a)Where a person dies, an estimation of tax under section 22 or 23 (as the case may be) may be made on his personal representative for any period for which such an estimation could have been made upon him immediately before his death, or could be made upon him if he were living, in respect of tax which became due by such person before his death, and the amount of tax recoverable under any such estimation shall be a debt due from and payable out of the estate of such person.

(b) No estimation of tax shall be made by virtue of this subsection later than three years after the expiration of the year in which the deceased person died in a case in which the grant of probate or letters of administration was made in that year and no such estimation shall be made later than two years after the expiration of the year in which such grant was made in any other case, but the foregoing provisions of this paragraph shall have effect subject to the proviso that where the personal representative
(i) After the year in which the deceased person died, lodges a corrective affidavit for the purposes of assessment of estate duty or delivers an additional affidavit under [section 48 of the Capital Acquisitions Tax Consolidation Act, 2003], or
(ii) Is liable to deliver an additional affidavit under the said [section 48] has been so notified by the Revenue Commissioner and did not deliver the said additional affidavit in the year in which the deceased person died

> Such estimation [or assessment] may be made at any time before the expiration of two years after the end of the year in which the corrective affidavit was lodged or the additional affidavit was or is delivered]".

44. The correct remedy is, as I have found, one of judicial review within six months of the raising of the assessment. Even if I were incorrect in holding that there is no jurisdiction in the Appeal Commissioners to decide on the validity of the assessment in the first place, and that a point arose of real substance at the hearing which made it inescapable that cross-examination should be allowed, the request in explicit terms to the Appeal Commissioners to order the calling of the tax inspector came five years after the date of the assessment. It would not within the scheme of the ordered collection of tax that a point of that magnitude would be called on for definite ruling so late. I see some validity, therefore, in the points made by Woolf J. in the *Pegasus Birds* case as to indicating the point at an early stage. Woolf J. goes on to require full particulars of the allegation whereby it is claimed that a tax assessment should be struck down on appeal as, in effect, an excess of jurisdiction. I cannot see that particulars in that detail are required. It must be remembered, however, the taxpayer on whom the burden of proof rests is calling for the tax assessment to be struck down: the Appeal Commissioners, in cases where that jurisdiction might arise, are entitled to be persuaded that such a procedure involving cross-examining the tax inspector is necessary. More than an indication of a vague kind, in my view, should be given. Woolf J. said in that case that particulars should be furnished as to what wrongdoing was alleged against the commissioner, the equivalent of the tax inspector. In a judicial review, that burden would be inescapable. An applicant would have to show that the assessment was raised unreasonably, or outside the parameters of the statutory powers, or by taking irrelevant factors substantially into account. In judicial review, the applicant would be saying that the assessment was wrongly raised because of a particular reason or reasons. Turning from judicial review to a hearing before the Appeal Commissioners, I cannot see how any other procedure than requiring some sufficient indication as to why there should be an examination of a tax inspector who has raised a V.A.T. assessment would be in accordance with fair procedures. Otherwise, how are the Revenue Commissioners to answer the point? I cannot see how a hearing before the Appeal Commissioners could be orderly, and a decision by them fair, unless the taxpayer should be required to at least elucidate some ground for concern that makes cross-examination inescapable. That is a requirement of basic fairness of procedures. It is necessary for the taxpayer to explicitly mention the point on the first hearing day and to proceed with dispatch to engage in a definite submission that cross-examination should occur that day or at a very proximate time because it is inescapable to the resolution of an issue in respect of which the Appeal Commissioners are obliged to enquire into. That cannot arise in the context of the jurisdiction of the Appeal Commissioners hearing this kind of appeal, one as to amount following on a V.A.T. assessment; as I have already ruled.

Result

45. I not satisfied that the Appeal Commissioners had jurisdiction to enquire into the validity of this assessment by the tax inspector to V.A.T. liability. Instead, the Appeal Commissioners were concerned with entirely abating the liability, with reducing the amount of the assessment of the tax due, leaving it stand or with increasing it. In other words, they were concerned with the amount of the assessment only. Where jurisdiction might be given in other forms of appeal, and I cannot decide that in this case, any application to cross-examine a tax inspector would have to be dealt with on a case by case basis depending on the issue raised and whether cross-examination was inescapable in order to fairly decide a point. That did not arise here, because that point is outside the scope of this appeal. It was, however, had it arisen within their jurisdiction, within the competence of the Appeals Commissioners to decide that no point involving a capricious assessment, one divorced from a tax inspector having reason to believe that an amount of tax was due, arose in this case. The decision to refuse cross-examination was made within jurisdiction. Were that not so, the effect of extinction of the liability to V.A.T. after the expiry of four years, absent neglect or fraud, under s. 30 of the Value Added Act, 1972, should the cross-examination succeed in showing capriciousness, would bring the hearing into the realm of undermining the orderly collection of taxation and the disposal by early inquiry of substantive points on appeal to the Appeal Commissioners. I would therefore have refused this application, in addition, on discretionary grounds.