THE SUPREME COURT

Supreme Court Record No. 2012/66
Court of Appeal Record No. 372/2014
High Court Record No. 2010/56 JR

O'Donnell J.
McKechnie J.
MacMenamin J.
O'Malley J.
Finlay Geoghegan J.

BETWEEN

DUNNES STORES

APPLICANT/APPELLANT

-AND-

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

RESPONDENTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 4th of June, 2019

Introduction

1. As of the 4th March, 2002, Ireland became the first country in the world to introduce a plastic bay levy with a view to discouraging unnecessary and excessive use of plastic bags thus reducing their impact on the environment. The statutory basis for same is contained in the Waste Management Act 1996 ("the 1996 Act") and the Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001. Both were enacted at least in part against the backdrop of Council Directive 91/156/EEC of the 18th March, 1991 amending Directive 75/442/EEC on Waste ("the Directive").

2. Dunnes Stores is an unlimited company retailing food, textiles and home wares, who challenge the levy's application to certain "flimsy" plastic bags suitable for certain uses including the carrying of groceries. The first named respondent ("the Revenue" or "the Revenue Commissioners") is the body charged under the Regulations with the collection of such levy, the second named respondent is the relevant Minister of Government under the waste management provisions, ("the Minister"), third named is the Irish State and the fourth named respondent is so named as representing the State.

3. This is an appeal from the judgment of Hedigan J. of the High Court delivered on the 13th day of December, 2011. Immediately after the coming into force of the 33rd Amendment of the Constitution there were a number of appeals transferred from this Court to the Court of Appeal by direction of the Chief Justice: when the majority of the retained appeals had been disposed of, there was then a suggestion that some relevant appeals would be transferred back to this Court, so as to assist with the backlog which was faced by the Court of Appeal. The appellant, applied under Article 64.3.3° of the Constitution to have that direction cancelled and the appeal transferred back to this Court. By way of Determination dated 28th May, 2018, their application was consented to and thus the matter returned to and has been heard by this Court ([2018] IESCDET 66). This is my judgment in respect of the presenting issues.

Statutory Scheme:

4. The principle statutory provision in this case is to be found in s. 72 of the 1996 Act (as inserted by section 9 of the Waste Management (Amendment) Act 2001) ("section 72 of the 1996 Act"). Subsection 1 of that section, in its definition of plastic bag specifies three criteria which must be satisfied in order for such a bag to warrant the charging of the levy, these are that:-

   i) It must be made wholly or in part by plastic;
   ii) It must be suitable for use by a customer at the point of sale in a supermarket service station or other sales outlet, and;
   iii) It must not fall within a specified class of exceptions to be identified by the Regulations: five such classes were in fact described. Three of these impose particular product and use specification: they also have a measurement proviso in that the bags must not be greater than 225mm in width (exclusive of any gussets), 245mm in depth (inclusive of gussets) and 450mm in length (inclusive of handles). If the bags do not fit within each of these specifications, then they are not a recognised exception, and should they fulfil the above two criteria then they will be deemed a 'plastic bag'.

5. In addition however, regard must also be had, in this context to s.72(2) of the Act for it is suggested that this provision is highly relevant for determining what comes within the overall definition. That subsection confers powers on the Minister to make Regulations referable to the levy. Because of the pivotal role it plays, this provision although later referred to as well, warrants recitation at this point:-

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

6. Whilst subsection (6) of that section outlines several matters which may be included in the Regulations, subsection (5) however is different and is mandatory in form. It reads as follows:-

> "Regulations under subsection (2) shall provide for the following matters —
>
> (a) the specification of the person or persons to whom the levy shall be payable (who or each of whom is referred to in this section as a "collection authority'),
>
> (b) the conferral of powers on a collection authority with respect to the collection and recovery of the levy (and, for this purpose, the regulations may adapt, with or without modifications, the provisions of any enactment relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment)."

Subparagraph (b) is central to the vires and constitutional challenge. Before leaving s. 72 it is apt to point out that the same was subsequently amended by s.12 of the Environmental (Miscellaneous Provisions) Act 2011 by the substitution of subsection (3) and the insertion of a number of new subsections dealing with the amendment and calculation of the amount of the levy. This amendment is not of relevance to the issues raised in this case.

7. The second named respondent, having obtained the consent of the government and having cited sections 7(1), 29(3) and the aforesaid section 72(2) of the 1996 Act as the authorising basis, made The Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001 on the 19th December, 2001 ("the Regulations"). Under Regulation 3(1), retailers of the outlets specified are obliged to charge customers an amount equivalent to the levy in respect of the supply to them of plastic bags. The specific wording, which in this respect mirror images that of s.72(2) is important for our purposes so it bears directly quoting:

> "3(1) On and from the 4th day of March, 2002, there shall be charged, levied and paid a levy (which shall be known as the environmental levy and is in these regulations referred to as 'the levy') in respect of the supply to customers, <u>at the point of sale</u> to them of goods or products <u>to be placed in the bags</u>, or otherwise of plastic bags in or at any shop, supermarket, service station or other sales outlet." (emphasis added)

The levy was initially set as being 15 cents under Regulation 4 but was increased to 22 cents under the Waste Management (Environmental Levy) (Plastic Bag) (Amendment) (No.2) Regulations 2007. It presently stands in this amount.

8. One further article of the Regulations should be mentioned, that is Regulation 5: such measure provides that in certain circumstances and subject to a number of conditions and requirements, certain classes of plastic bags are exempted from the statutory definition

and therefore do not attract the levy. This provision will be further referred to later in the judgment.

9. In the briefest of terms, therefore the underlying scheme in its essential meaning can be introduced as follows:

    i) Its object and purpose is to help prevent or reduce the generation of waste by cutting down on the use of plastic bags as defined, which evidently do not include those which are exempted. It does so by introducing a financial disincentive in respect of the supply of such bags.

    ii) It applies to specified outlets including supermarkets: on all such outlets there is imposed a direct liability to discharge the amount of the levy. (s. 72(4) of the Act)

    iii) In turn, such "accountable persons" are obliged to impose an equivalent amount on each customer to whom a plastic bag is supplied (Regulation 6): so if functioning as intended, the outlet, save for administrative costs, should not be at a loss.

    iv) Such persons must itemise for each customer every charge imposed and must also keep detailed records of the number of plastic bags, as defined, which have been supplied in the circumstances indicated: in addition, they must also make periodic returns and payments to Revenue Commissioners in respect thereof. (Regulations 7, 11 and 10)

    v) The Revenue Commissioners are given the power to estimate what they say is the true liability where no returns have been made or where they have reason to believe that the returns so made constitute an underpayment by the accountable person. (Regulation 12 and 13)

    vi) The Revenue Commissioners are also given power to recover the levy by the use of the mechanism or the procedure, inter alia, which applies to the recovery of income tax. (Regulations 15)

    vii) Finally, provision is made so that an aggrieved person, that is the person who carries on the business of selling goods or products in the outlets affected, can appeal to the Appeals Commissioners in respect of the aforesaid matters. (Regulation 16)

    Whilst the scheme will be more fully explained later in this judgment, this brief description is necessary as this stage, for otherwise the issues would be difficult to follow.

10. The essential dispute for resolution in this case is whether the type of bag in issue should be regarded as being within the statutory definition of plastic bags. Dunnes Stores have questioned the meaning which the Revenue Commissioner have ascribed to such bags. As part of this challenge they contest the validity, by way of a *vires* argument and the constitutionality of certain provisions of the Act and of the Regulations. A further matter arises which is the submission that in their dealing with the appellant the Revenue

Commissioners have acted unfairly. Whilst there are a number of other issues in play, the above description however should be sufficient for present purposes so as to facilitate a basic understanding of the controversy in place. Accordingly, there is an interpretative issue, a vires issue, a fair procedures issue and a constitutional issue.

Factual Background:

11. This appeal arises from a number of assessments raised by the Revenue Commissioners dated 12th November, 2009 in respect of four accounting periods from 1st July, 2004 to 30th June, 2008 ("the Assessments"). The total sum levied was €36,573,727. These Assessments came about following the review next mentioned, as a result of which the Revenue concluded that the bags in dispute were subject to the levy whereas Dunnes Stores took the opposite view. That review was in fact an audit of the appellant's activities relating to this environmental levy (on plastic bags), which commenced on 22nd February, 2007. The trading period specified by the notifying letter was that between 01/10/05 to 31/12/05 for which the appellant was asked to make available its trading records, in order to facilitate what was intended. Further, they were told that the audit would be focusing on the categories of 'excepted bags' as provided for in Article 5 of the Regulations.

12. On a number of occasions between March and April, 2007 Mr. Joseph McDonnell of the Revenue Commissioners duly visited three separate retail stores of the appellant. A direction then issued to Dunnes Stores on 15th May, 2007, requesting them to attend to certain specified items. Mr. Austin Carroll of the Revenue received an email on 5th July, 2007 from Mr. Pascal Brennan, a partner in Deloitte & Touche, who was writing on behalf of Dunnes Stores, requested a meeting in order to advance matters regarding the measurements of the plastic bags in dispute and for both sides to "fully set out their positions…. in the spirit of cooperative compliance." By further letter dated 1st August, 2007, Mr. Brennan again requested that the Revenue "immediately desist from taking further action in the audit until it had been confirmed that the audit would be conducted in accordance with a proper interpretation of the Regulations." He also observed that the conduct of the Revenue in the audit process had directly resulted in significant cost and inconvenience for his client.

13. Mr. McDonnell replied, on 9th August, 2007, with the following: -

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

He also stated that it was not satisfactory that the audit had been ongoing since the previous February and asked for Mr. Brennan's assistance in bringing it to a close. Finally, he said that a failure by Dunnes Stores to furnish all required information may leave him with no option but to raise an assessment on a 'best estimate' basis. Mr. Brennan's response via an email on 4th September, 2007, was to make a submission concerning the legislative interpretation of the regulations in question. By e-mail dated 5th September

2007, Mr. Brendan Crawford of the Revenue Commissioners stated that the issues raised by Deloitte & Touche were academic at that stage and that he would revert to them in due course when he had a full audit report from the team.

14. Whilst there was some communication between the parties after the making of that submission, which for the most part related to its content, the next significant event was a letter dated 27th June, 2008. That letter was in the form of a Notice of Assessment, for the period between 1st July, 2004 to 30th June, 2005 inclusive. Mr. Tom Sheridan, the Company Secretary of Dunnes wrote to Revenue on 14th July, 2008, informing them that they would be appealing the assessment on the grounds that it was excessive and that there was no liability due. Receipt of this letter was acknowledged on 18th July, 2008.

15. Mr. Brendan Crawford of Revenue requested, by way of letter dated 24th July, 2008 certain pieces of information which if supplied would permit him to progress the appeal and fix a date for hearing. He wished to know if the appeal would be one of "argument" or "quantum". Mr. Sheridan in reply said it would not be possible to answer that particular question until he had full details of the basis on which the Assessments were calculated, in particular the following:

    i) How the inspector had arrived at his assessment;

    ii) On what basis he had concluded that the environmental levy due 'per my calculation' was €12,869,048;

    iii) Details of the relevant calculations, and;

    iv) The evidential basis upon which those calculations had been arrived at.

    In his response of the 8th August, 2008, Mr. Crawford stated that there was no provision in any of the relevant legislation or regulations which required a Notice of Assessment to give any details or particulars, except for the amount payable by the chargeable person. He also stated that the assessment was based entirely on the liability of the appellant in relation to the environmental levy and thus all material relevant to that levy was within their (the appellant's) power or procurement or control.

16. Dunnes were then served with further Assessments on 18th July, 2008 for periods between 1st July, 2006 to 30th June, 2007 and 1st July, 2007 to 30th June, 2008. These were also appealed by Dunnes on the same basis as previously indicated: that they were excessive and that there was no liability due. Following discussions with the appellant, the Revenue Commissioners wrote on 19th September, 2008 to inform them that all of the Notices as served had been vacated. The appellant confirmed, that same day, that should Revenue raise new assessments on or before 10th October, 2008, they would not raise any time limit point. Dunnes Stores did however reserve the right to pursue any other relevant issue through litigation, including the validity of the regulations. In response the Revenue confirmed that they would not take any delay point if Dunnes should issue such proceedings.

17. Mr. Crawford served further Notices on the appellant on 10th October, 2008: these were he said in respect of additional liabilities identified during the recent audit. By letter dated 17th October, 2008, the Revenue also vacated these Notices. On 3rd November, 2009, Mr. McDonnell then met with representatives for the appellant, Larry Howard and Noel Fox and on that occasion and by fax the following day, furnished them with some information as to the basis upon which the Assessments were arrived at. On the 12th November, 2009 the first named respondent informed Dunnes Stores that the Assessments had been arrived at under the Regulations in respect of accounting periods from 1st July, 2004 to 30th June, 2005; 1st July, 2005 to 30th June, 2006; 1st July 2006 to 30th June 2007 and 1st July 2007 to 30th June 2008. These were the final assessments and it is those that give rise to this appeal: the total sum claimed was €36,573,727.

18. The appellant promptly wrote to the Revenue Commissioners and the office of the Appeal Commissioners on 19th November, 2009, informing them that they wished to appeal against the Assessments, on the grounds previously notified to the Revenue Commissioners. Before any such hearing took place however, Dunnes Stores, on 25th January, 2010, sought and obtained leave to apply for several reliefs by way of an application for judicial review. Their argument and those of the Revenue, which in large measure have remained essentially the same throughout the entire proceedings, are set out later in this judgment.

Judgment of the High Court:

19. Hedigan J. of the High Court delivered his judgment on the 13th December, 2011. He refused all reliefs sought by the appellant, which reliefs were as follows:

    a) An order of *certiorari* quashing the Assessments made by the first respondent of the environmental levy due by the appellant in respect of four accounting periods between July 2004 and June 2008;

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

    c) If necessary, a declaration that the Waste Management (Environmental Levy) (Plastic Bag) Regulations) 2001 are invalid and of no legal effect;

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

e) An order of prohibition restraining the first respondent from making any further assessments of any levy due by the applicant under the Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001 in respect of any accounting period;

f) An injunction restraining the first respondent from making any further assessments of any levy due by the applicant under the Waste Management (Environmental Levy) (Plastic Bag) Regulations 2001, in respect of any accounting period;

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

h) A stay on the taking of any steps by the first respondent on foot of the Assessments;

i) An injunction, restraining the first respondent from taking any steps on foot of the Assessments.

20. On the interpretative issue Hedigan J. first asked whether the levy was intended to apply only to: (i) those bags which were suitable for carrying away from the outlet the goods or groceries so purchased ("carrier bags"), and (ii) to bags supplied at point of sale and not otherwise. He noted that this argument failed to have regard to the detailed provisions which defined which bags are exempted. If correct, that argument advanced would have obviated the need for any such exemptions. He did admit however to having thought initially that the wording of s. 72 of the 1996 Act was ambiguous, however after reading it carefully he found it to just to have been "awkwardly phrased". The word "otherwise" in the overall context of the subsection (2) of the section and of Article 3 of the Regulations meant "otherwise" than at the point of sale. Therefore, in his view both on the plain meaning of the words and from looking at the Act as a whole, the purpose of which was to reduce as much as possible the presence of discarded plastic bags in the environment, this interpretation seemed most likely. Accordingly, flimsy bags whether supplied at point of sale or otherwise were captured by the definitional clause.

21. On one aspect of the *vires* issue Dunnes Stores had argued that section 72(2) of the Act obliged the Minister to specify a class or classes of sales outlets to which the levy applied. The learned judge rejected such a contention saying that the same would have no practical benefit to the process. A related argument was that there was no valid legal basis for the making of the Regulations in the first place. He found in this regard that the statutory provisions cited (para. 7 above) were much wider in effect than that contended for by the appellant. He therefore also rejected that submission.

22. The appellant's argument on the fair procedures issue was that in failing to fully set out the basis upon which the Assessments were calculated, the Revenue Commissioners acted

in breach of that requirement. The learned judge immediately discounted any reliance on Article 6 of the European Convention of Human Rights to support this claim, quoting in the process from *Fortune v. Revenue Commissioners* [2009] IEHC 28 (Unreported, High Court, O'Neill J., 23rd January, 2009) ("Fortune"). In that case O'Neill J. held that this provision had no application to proceedings relating to the imposition or assessment of tax. In relation to the same argument but one more broadly based on general administrative law principles, he did not dispute but that the Revenue Commissioners are obliged to follow fair procedures but stressed that the question of what constitutes fairness is case dependant. Given that the appellant was "a large, well-resourced and professionally advised body", Hedigan J. found it difficult to grasp quite what it was that they did not understand, especially with the extensive communication both written and verbal which had taken place between the parties.

23. The learned judge went on to reject the contention that the information which the Revenue did not provide was of such nature that it prevented Dunnes from effectively exercising their right of appeal, or from formulating that appeal with precision. Further, he thought it of importance to note that it was only in response to a request from the Revenue for certain information so that the appeal could be progressed that Dunnes asserted some unspecified disability in understanding the basis for the Assessments. As to the cases cited by the appellant on this issue, Hedigan J., could not find any basis in them for concluding that their right to fair procedures had been breached. The case of *Keogh v Criminal Assets Bureau* [2004] IESC 32, [2004] 2 I.R. 159 ("*Keogh*"), was entirely different for several reasons. Firstly, Mr. Keogh was a lay person, putting him in a very different category to Dunnes Stores in terms of his resources and ability to obtain professional advice. Secondly, Mr. Keogh had been deprived of his right of appeal against a particular ruling made by CAB, acting as the Revenue Commissioners, by reason of the failure by CAB to inform him of the time limits applicable to that appeal: whereas as evidenced by these very proceedings, Dunnes Stores have not been deprived of any such right. Therefore, Keogh was of no assistance in this regard: consequently, there was no substance to this submission.

24. On the final issue, the judge discussed the allegation of an unconstitutional delegation of legislative power to the Minister under s. 72(5) of the Act, which the respondents challenged firstly, on the basis that the appellant did not have sufficient locus standi to argue the point. They submitted that Dunnes Stores did not either claim or reveal any particular way in which the adoption of the disputed provisions adversely affected them (para. 6 above). Hedigan J. viewed the real argument on this issue as Dunnes Stores asking the court to assume, that the adaptation of existing measures to the collection of the levy was less favourable to them than any other alternative option. Relying on the dicta of Hardiman J. in *A v Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 4 I.R. 88, where it was held that any challenge to the validity of a legislative measure, had to be considered solely by reference to the individual circumstances of the applicant, the learned judge could not so agree. Thus he found that Dunnes Stores had no standing to raise this issue. However, without prejudice to this finding, he went on to express a view on the submission that the legislation was constitutionally flawed: he did so succinctly and

with some certainty in finding that there was no issue with the constitutionality of the provisions in question. On the principles and policies argument, he was satisfied that the Oireachtas in the primary legislation had fully and clearly set out what these were, and that it had given to the Minister power only to set in train the mechanics etc., of what it had intended. Accordingly, the submissions on all issues were rejected and the claim would be dismissed.

Appellant Submissions:

25. The appellant contends that Hedigan J. erred in not finding that the Assessments were *ultra vires* or unlawful, that the Regulations were likewise as infirmed and in addition were unconstitutional, that s. 72(5) of the 1996 Act was in breach of Article 15.2.1° of the Constitution and that the Revenue acted in breach of fair procedures. Their submissions commence by outlining the general guiding principles of interpretation, the most basic of which is that of the literal rule. They also refer to the rule that a court will avoid an interpretation of a statutory provision which would render some of the wording used, meaningless or as surplusage. They cite many of the seminal cases in this regard (*Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, *DPP v. Corcoran* [1995] 2 I.R. 259). The appellant then goes on to note the adjustment which occurs in the construction of statutory measures where a penal or taxation liability is imposed: they submit that the provisions at hand in this case fall firmly within this category and as such should be strictly construed. (*Inspector of Taxes v. Kiernan* [1981] I.R. 117)

26. Applying this approach to s. 72(2) of the Act and to Regulation 3(1) and, in particular to that part of both provisions which refer to the supply of such bags at the point of sale, Dunnes Stores submit that the trial judge erred in his conclusion that these measures are not confined to plastic bags supplied at that point only, and in doing so was wrong in the meaning which he attributed to the words "or otherwise". They claim that the grammatical construction of the sentence, including in particular the placement of the commas makes this clear: "…in respect of the supply to customers, at the point of sale to them of goods or products <u>to be placed in the bags, or otherwise</u> of plastic bags in or at any shop, supermarket, service station or other sales outlet." (emphasis added) (para. 7 above). They would interpret "or otherwise" as referring not to a point of sale requirement but rather to the goods or products to be placed in the bags. Furthermore, it is their contention that if there was to be any doubt on this matter then the rule of strict construction dictates that it should be resolved in their favour.

27. The appellant takes issue with an apparent failure of the trial judge to discuss another element in the definition of a plastic bag: the requirement that it be "suitable for use by a customer at the point of sale" (s.72(1) of the Act). They submit that he failed to reach any conclusion on this matter and that such failure is fatal to the court's overall assessment of interpretation. It is their view that the criterion of suitability for use, means that the bag in question must be suitable for packing and carrying away from the retail outlet all items which have been purchased, and thus they must be of sufficient capacity, strength and durability for that purpose: in effect, what is being described is a "carrier bag". Quite evidently they say, a "flimsy bag" does not meet this description.

28. In addition, the trial judge's conclusion that all plastic bags that do not meet the specified exemptions are within the levy is roundly rejected: the appellant submits that this finding renders the phrase "which is suitable for use by a customer" effectively redundant: it means in reality that every bag, of every possible customer of every possible shop is, unless specifically exempted, within the charge. That they say is fundamentally wrong: the specific exemptions must be looked at as representing a more customer/shop specific test. Those exemptions were never intended to influence the core definitional provisions in the manner so found by the trial judge.

29. In conclusion, they submit on this point that the flimsy bags at issue in the Assessments do not fulfil the functional requirements in terms of capacity, strength or durability so as to be suitable for use by customers at the point of sale for carrying away the goods or products so purchased. Accordingly, these are outside the intended scope of the levy.

30. A further argument advanced relates to the nomination of the outlets to which the levy should apply. It is suggested by Dunnes Stores that the phrase in s.72(2) of the 1996 Act - "in or at a specified class or classes of supermarket, service station or other sales outlet" – obliges the Minister for policy reasons to engage in an exercise of defining a particular class or classes of outlet for this purpose: if the Oireachtas had intended that all such outlets would be captured, it would simply have said so. Therefore, by failing to define the class, the Minister has acted in a broad-brush manner which is *ultra vires* the parent section.

31. On the fair procedures issue it is said, as above outlined that the Revenue Commissioners, in failing to provide any or any sufficient information in relation to the basis on which they calculated the amount of the levy, breached procedural fairness. It is also claimed that the mere setting out of the estimated figures in respect of each accounting period is not sufficient. The appellant refers to their letter dated 14th December, 2009 which requested details of the basis for each assessment, such as the relevant calculations etc. and which also sought clarification as to the types and categories of bags being included. However, the Revenue refused this request, offering by way of justification that no requirement for the giving of such information is stipulated in either in Article 16 of the Regulations or in s. 954(5) of the Tax Consolidation Act 1997. It is asserted by Dunnes Stores that this failure has undermined their entitlement to have an effective appeal against the subject Assessments. To do so, they require to understand at a minimum the following:

a) What portion of the calculations relate to bags supplied at point of sale and to back of the store "flimsy" bags, and to bags for Northern Ireland which were never used in Ireland;

b) The basis upon which the calculations were made;

c) Where estimates of, or extrapolations from, actual figures were used or made, the basis upon which these estimates or extrapolations have been arrived at.

32. In this context, reference is made to the words of Lord Macnaghten in *London City Council v. Attorney General* [1901] A.C. 26 at 35 in which he said, "income tax…is a tax on income. It is not meant to be a tax on anything else" in order to submit that whilst the levy applies to plastic bags, not every plastic bag is included in the definition. Therefore, in the absence of necessary information from Revenue, the appellant can only assume that the levy has been applied to every bag potentially available, even those external to the statutory definition, such as where bags were not supplied to any customer or where such bags were intended for use outside the jurisdiction.

33. In support of their entitlement to fair procedures at a general level, they cite *Dellway Investments v NAMA* [2011] IESC 4, [2011] 4 IR 1 and *J & E Davy, trading as Davy v Financial Services Ombudsman* [2010] IESC 30, [2010] 3 I.R. 324, both as cases relating to statutory codes which did not expressly provide for procedural fairness but where nonetheless the courts found that such a requirement existed. They also refer to *Keogh v Criminal Assets Bureau* [2004] IESC 32, [2004] I.R. 159 to demonstrate the importance of the duty to observe fair procedures, particularly in situations involving a taxpayer who wishes to appeal a notice of assessment. In that case, Keane C.J. held that CAB acted in breach of the fair procedures requirement specified in Taxpayer's Charter of Rights by failing to provide the applicant with information regarding a right to appeal when the circumstances demanded.

34. Turning then to the last issue, the appellant disagrees with the trial judge's conclusion that it does not possess requisite standing to challenge the constitutionality of the delegation of legislative power to the Minister. In this context, they point to the fact, which is not disputed by the respondents, that where Dunnes Stores collected the levy they passed on the monies to Revenue, and as such discharged their function as collection agent in respect thereof. They submit that what Revenue is now seeking is something quite different: namely, payment of significant money in respect of plastic bags where the levy, if applicable, was not collected and as such they must have locus standi to pursue their constitutional challenge.

35. On the constitutional point, the appellant submits that the trial judge failed to recognise that s. 72(5)(b) of the 1996 Act purports to allow the Minister to adapt, with or without modifications, the provisions of any enactment in relation to the estimation, collection and recovery of taxes: as such, in their view this amounts to the Minister being permitted to "copy and paste" into the Act external sources which have the effect of amending primary legislation. This, is it claimed, creates an unconstitutional delegation of legislative power. In support of this proposition, *Harvey v Minister for Social Welfare* [1990] 2 I.R. 232 is cited, where the Minister had made regulations pursuant to powers conferred by s. 75 of the Social Welfare Act 1952, which had the effect of withdrawing certain welfare entitlements that Mrs. Harvey otherwise would have been entitled to under the Act, and/or under the Welfare Code as a whole. This Court rejected the contention that the section itself was unconstitutional because it was capable of being interpreted in a manner other than that of empowering the Minister to make regulations which altered or amended primary legislation (*East Donegal Co-operative Livestock Mart Ltd v. Attorney*

*General [*1970] I.R. 317). The court did however find that the Regulation in question was ultra vires the authorising power. Thus Dunnes Stores also contend that if, contrary to the foregoing submission, this Court was not to find that s. 72(5)(b) of the 1996 Act did authorise the making of regulations which have the effect of amending primary legislation, then it is submitted that the Regulations themselves are *ultra vires*.

36. On the question of whether a clear set of principles and policies were set out in the Act, the appellant submits that the legislation fails the test established in *Cityview Press Ltd v. An Chomhairle Oiliúna* [1980] I.R. 381, by not stating how the estimation, collection and recovery of tax is to be adapted and extended to the estimation, collection and recovery of the levy. Citing the *dicta* of Denham J. in *Laurentiu v Minister for Justice* [1999] IESC 47, [1999] 4 IR 26, they compare the impugned provisions of the Aliens Act 1935 to s. 72(5)(b) of the Act: this in respect of the lack of goals, factors and purposes, which are absent from both. They note that while s. 9 of the Waste Management (Amendment) Act 2001 (which inserted s. 72) does give the purposes for which it was enacted as including giving effect to a number of specified Directives, none of these however make any reference to the plastic bag levy: accordingly, they are insufficient in themselves in excusing, what is otherwise an impermissible delegation of the law-making function of the Oireachtas.

Respondents' Submissions:

37. These submissions were filed on behalf of all respondents. The issues which arise in their view are, firstly, the type of bags which the environmental levy is applicable to, both in terms of where they are supplied to a consumer (point of sale) and their suitability for different uses, such as for wrapping and hygiene purposes on the one hand ("flimsy bags") or for carrying goods and products away from the outlet on the other ("carrier bags"). Secondly, whether the 2001 Regulations have failed to specify the class or classes of supermarket, service station or other sales outlet in such a way which renders them invalid and ultra vires. Thirdly, whether the appellant has *locus standi* to challenge the validity of s. 72(5)(b) of the Act, on the basis of Article 15.2.1° of the Constitution, in light of the doctrine of mootness and if so, whether the section is invalid on the basis as alleged and again if so, what consequences should follow therefrom. Finally, did the Revenue Commissioners breach a fair procedures requirement by failing to provide sufficient details of the basis upon which they arrived at each of the Assessments so raised.

38. The respondents suggest that on the core interpretative issue, the approach of Dunnes Stores is based on a misreading of both the 1996 Act and the 2001 Regulations, in particular a misreading of the term "plastic bag". They point out that the second criterion stated in s. 72(1) of the Act does not provide that only bags supplied at the point of sale are subject to that levy, or that they must be suitable at that point for the purposes of carrying groceries from the outlet in question. In other words, the levy is not so confined and is not restricted only to what has been described as carrier bags.

39. They draw attention to Article 5 of the 2001 Regulations which specifies five classes of plastic bags which are excepted from the general definition. Article 5(a)-(c) specify the

levy requirements which must be satisfied before a bag is so exempted from the levy: bags which are used "solely" for containing, fresh fish, fresh meat/poultry (these products must be contained in packaging (including a bag)), bags which are used "solely" to contain fruit, nuts and vegetables, confectionary, dairy products, cooked food, ice (these products must not otherwise be contained in packaging). Insofar as the bags do not comply with each of these nominated requirements and/or exceed any of the specified dimensions, they are not excepted from the definition. Bags which are not so excepted and which satisfy the other two statutory requirements of s. 72 are "plastic bags" within the meaning of both the Act and the Regulations. It is their submission that the bags at issue within these proceedings exceed one or more of the dimensions prescribed in Article 5 of the 2001 Regulations, but otherwise are within the scope of the definition: accordingly, they are not exempted from the imposition of the levy.

40. That being so, the respondents reject the suggestion that the statutory provisions were misconstrued or misapplied by either the Revenue or the High Court: the excepted classes are clearly and precisely defined by Article 5 and that measure properly understood, is not capable of being construed as saying that the bags must be supplied at the point of sale, and/or must be suitable at that same point for external or general use. Furthermore, they reject the contention that the wording of s.72 (2) of the Act is in any way ambiguous. Construed in its ordinary sense, the respondents submit that the wording of the section confers power on the Minister to make regulations (with the consent of the Government) in respect of the supply of plastic bags (as defined) to customers (at a point of sale or otherwise) in or at a specified class or classes of sales outlet (a supermarket, service station or other sales outlet). It is equally clear that in the exercise of that power, the Minister, under Article 3 of the Regulations, provided for the charging, levying and payment of a levy in respect of the supply to customers of plastic bags in or at any sales outlet. They submit that this is the only natural and common-sense construction of the provisions and they reject the suggestion that such is in any way a strained or artificial meaning of such provisions. Furthermore, they submit that if one approaches the interpretation in a purposive manner (the purpose of the legislation being to reduce and prevent excessive plastic bag waste), the outcome is the same as that derived from a literal approach: thus confirming the correctness of their view and that of the trial judge.

41. Turning to the appellant's contention that the rule of strict construction of certain statutory provisions trumps all other principles, the respondents reject this, as well as the suggestion that all ambiguities must be resolved in favour of the taxpayer. In support of this proposition, they quote from the decision of this Court in *McGrath .v McDermott* [1988] I.R. 258, a tax decision case in which the true meaning of the statutory provision in question was found by a consideration of other provisions of the statute as a whole and also by reference to the general purpose and intention of the legislation in question (p. 276 of the report).

42. The Revenue Commissioners make several other observations in relation to the Regulations: the fact that the scope of the provisions is not expressly limited to a particular type of bag which, if intended, would surely have been the case. They say that

several of the arguments advanced by the appellant would have required very clear wording before they could be sustained: for example the contention that where Article 3(1) refers "to goods or products to be placed in bags", it is actually prescribing the kind of bags which are normally used to carry away groceries and secondly, their suggestion that the words "or otherwise" in the Article can be understood as meaning that if a customer should take a grocery bag from the point of sale but not use it to carry his or her groceries from the outlet then in such circumstances it would be exempt from the levy. The respondents say it is manifest that such clear language was not set out and it is impossible to extract these kinds of limitations from the text actually so used.

43. Moving to the second issue: it is said that the Regulations are *ultra vires* due to their failure to specify the class or classes of supermarket, service station and other sales outlets to which the levy applies. They submit that the High Court was entirely correct in finding that for the purposes of Article 3(1) of the Regulations and s. 72(2) of the 1996 Act, the specified class or classes are any shop, supermarket, service station or other sales outlet. This is in full compliance with the requirement of these measures.

44. It is the respondents' submission that it is manifest that the challenge to the validity of section 72(5)(b) is moot in that the issue is purely hypothetical and academic: whilst it acknowledges that the court does have a discretion to hear a ground of appeal which is moot, this discretion, they say should be exercised with caution. They argue that there is no basis in this case for departing from the normal rule and that the challenge to the validity of s. 72(5)(b) should be dismissed on this basis or on the alternative basis that the appellant lacks locus standi to make the argument. It is the respondents' contention that this challenge was truly intended to deprive the 2001 Regulations of their legislative basis and by extension, to deprive the Assessments of their validity. However, even if successful in this respect, it is pointed out that the 2001 Regulations were not made exclusively on the basis of s. 72: rather they were also made in the exercise of powers conferred by s. 7 and 29 of the Act thus even if the appellant could establish the unconstitutionality of s. 72(5)(b), this would not necessarily deprive the Regulations of their legal basis.

45. In relation to the constitutionality issue *per se* of s. 72(5)(b) of the Act, the respondents first point out that the section enjoys the presumption of constitutionality and secondly that, similar to the section which was challenged and ultimately upheld in *Harvey v. Minister for Social Welfare* [1990] 2 I.R. 232, the actual terms do not make it necessary or inevitable that the Minister in exercise of the powers given therein must invade the function of the Oireachtas. This can be entirely avoided by applying the double construction rule: accordingly, Article 15.2.1° is not infringed. The respondents state that the manner in which the Minister actually exercised the discretion conferred by s. 72(5)(b) of the Act reinforces the constitutionality of the section. There is nothing in the Regulations which was pointed out by the appellant as being constitutionally permissible.

46. On a further strand of this general argument, the respondents suggest that the appellant misapplied the *Cityview* test when coming to the conclusion that no principles or policies

were contained in the legislation. Quite apart from those which are inherent in the impugned section, the core purpose of the overall statutory provisions is to reduce plastic bag wastage by empowering the Minister to make regulations within the terms of that Act, to that effect. Thus, it is submitted that the regulations so made do not enable any more to be done, other than simply giving effect to the principles and policies set out in the 1996 Act and other than merely the filling in of details of the basic law which is set out in the statute.

47. Finally, the respondents discuss the relief sought by the appellant in relation to the alleged breach of fair procedures on the grounds that they were not provided with the details of the basis for each of the Assessments. They submit that this complaint must be viewed in light of the factual circumstances in which it arose: the nature and extent of both the interaction and exchange of information and documentation between Dunnes and the Revenue Commissioners, the fact that the material relevant to the levy is within the control, power and procurement of the appellant and the fact that the appellant was able to formulate its appeal even without the information sought. Furthermore, they submit that since the appellant has presented an erroneous construction of the relevant legislation in relation to "flimsy bags and back of store bags", something which they have addressed in the rest of their submissions, the contention of fair procedures being breached for a lack of information about these bags is misplaced and in any event was not needed for the construction of their appeal.

48. The respondents distinguish the authorities cited by the appellant on this issue, *e.g.* Keogh v Criminal Assets Bureau [2004] IESC 32, [2004] 2 I.R. 159, due to their markedly different factual backdrops to the within. Turning to the appellant's objection to Hedigan J.'s reasoning in relation to *TJ v Criminal Assets Bureau* [2008] IEHC 168 (Unreported, High Court, Gilligan J., 1st May, 2008), the respondents list seven grounds on which to apply the reasoning of Gilligan J. to the within, on a *mutatis mutandi* basis. It is not necessary to list each of the seven, if only to note that the respondents do not believe that there was anything unfair in the procedure, or that the position adopted by them was obstructive to the applicant in any way or that it put the applicant in an impossible situation wherein they could not deal with bare assessments. They submit that the appellant is well placed to know the basis for the Assessments given that all material relevant to the levy was within its power of procurement and control.

Discussion/Decision

49. Arising out of the High Court judgment and having regard to the submissions made, the essential issues upon which argument was addressed can be summarised as follows: -

(i) Do the Regulations cover the type of bag above referred to, having regard to its place of availability within a supermarket, and also its intended use by the customer?

(ii) Are the Regulations ultra vires the parent Act in that they fail to specify the "class or classes of supermarket, service station or other sales outlets", a phrase which is referred to in s. 72(2) of the Act?

(iii) Did the Revenue Commissioners act in breach of fair procedures and/or in breach of natural and constitutional justice by refusing to provide adequate details of the basis on which the Assessments above identified have been calculated?

(iv) Is s. 72(5)(b) of the Act unconstitutional as violating the provisions of Article 15.2.1° of the Constitution, and are the Regulations which implement that provision, in particular Article 15 thereof, ultra vires the powers of the Minister, and finally is there sufficient principles and policies contained in the parent legislation?

I propose to deal with these in the sequence stated.

Precursor – the Statutory Basis for the Regulations:

50. As a precursor to dealing with the first matter, which is the most important interpretative issue in the case, there is a challenge to the legal basis upon which the Regulations were made in the first instance. Dunnes Stores say that since the Regulations closely mirror the language used in s. 72 of the 1996 Act, and since the declared intention of the Act, as evidenced by the definition of "waste" in s. 4, is to impose a levy for the purposes of the prevention, rather than for the recovery of waste, then the only statutory basis to ground their validity must be found in s. 72 itself. Accordingly, if declared to be unconstitutional, the Regulations must fail as both s. 7 and 29 of the Act, which were also cited, are irrelevant. It is unclear if there is a further aspect to this point, namely that as the Minister has also recited these "immaterial provisions", in this context, such inclusion in and of itself, renders the entire Regulations invalid.

51. It is correct to say that in making these Regulations, the Minister invoked the powers conferred on him by s. 7 and 29 of the 1996 Act, and by s. 72 of that Act as inserted by s. 9 of the Waste Management (Amendment) Act 2001, as the legal basis to validate the Regulations. Section 7 is general in both nature and description and permits the Minister to make "regulations prescribing any matter or thing which is referred to in this Act as prescribed or to be prescribed or for the purpose of enabling any provision of this Act to have full effect" (subs (1)). Furthermore, under subs (2), regulations may make different provisions in relation to different areas, different circumstances, different classes of persons or waste and different waste management, or other activities. "Prescribed", for these purposes means prescribed by regulations made by the Minister under the Act (s.2). Section 29 permits the Minister under subs (3) to make regulations in relation to or for the purposes of the recovery of waste or a specified class or classes of waste, and under subpara (b) such regulations may include provisions for the imposition of "responsibility obligations" on producers of products. Furthermore, subs (4), which is stated to be without prejudice to the terms of subs (3) states that regulations may provide for all or any of the following matters:-

> (a) requiring the labelling or marking of a product or substance or its packaging, in a specified manner…
> (b) specifying requirements to be complied with as respects the nature, composition or design of packaging and the use to be made of packaging…, and

(f) requiring the owner or manager of a supermarket, service station or other sales outlet to impose a charge on a customer in respect of the provision by him or her to the customer of any bag, container or other such packaging in relation to products or substances purchased by the customer at that sales outlet…" (Section 72(2))

The third basis cited in s. 72(2) which is quoted in full at para. 5 above.

52. At the outset it is not perfectly clear what precise point is being made. It may well be, as articulated at para. 50 above, namely that s. 72 of the Act, on which some of the most important provisions of the Regulations are modelled, is the only section that can be relied upon in this regard. It seems obvious that once s. 72 was inserted into the 1996 Act, it became necessary to introduce Regulations in order to bring the levy into being. Even without subs (2) of that section, however this in my view could have been done under s. 7 "…for the purpose of enabling a provision of the Act to have full effect…". Equally so, the levy could have been introduced by reference only to s. 29(3) and (4). Accordingly, even if s. 72 had not been relied upon as an authorising power, the Regulations could have rested there legitimately on either or both of s. 7 and s. 29 as stated. I therefore do not believe that there is anything of substance in this point.

53. On the other hand, it might be suggested that if s. 72 is declared invalid, then the mere inclusion of that section would by and of itself render the Regulations invalid. I do not accept this point. In my view, the mere citation of a non-applicable provision would not render the resulting instrument invalid, provided that such instrument also relied on a power that was both legitimate and appropriate. Accordingly, I would reject the submission on this issue.

Issue No. 1: The Interpretative Issue

54. The principal but not the only statutory and secondary provisions which are relevant to this interpretive issue are those contained in s. 72 of the 1996 Act, and in Articles 3 and 5 of the Regulations. Whilst these have been outlined, at least in part, in the introductory section of this judgment, for ease of reference they should be cited again. Those which are material on this aspect of the claim, read as follows: -

"72.

(1) In this section -

'plastic bag' means a bag –

(a) made wholly or in part of plastic, and
(b) which is suitable for use by a customer at the point of sale in a supermarket, service station or other sales outlet,

other than a bag which falls within a class of bag specified in Regulations under subsection (2) as being a class of bag exempted from this definition.

(2) The Minister may with the consent of the government make Regulation providing that there shall be chargeable, leviable and payable a levy (which

shall be known as an 'environmental levy') and is in this section referred to as the 'levy') in respect of the supply to customers, at the point of sale to them of the goods or products to be placed in the bags, or otherwise of plastic bags in or at a specified class or classes of supermarket, service station or other sales outlet. (emphasis added)

(3) …

(4) …

(5) Regulations under subsection (2) shall provide for the following matters –

(a) the specification of the person or persons to whom the levy shall be payable (who or each of whom is referred to in this section as a 'Collection Authority'), or

(b) the confer of powers on a Collection Authority with respect to the collection and recovery of the levy (and, for this purpose the Regulations may adapt, with or without modifications, the provisions of any enactment relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment)."

From several other provisions of the section, including subs (3) and (6) it is absolutely clear that the supply of such bags are "to customers".

55. Article 3 of the Regulations reads as follows: -

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

(2) …

4. The amount of the levy shall be…

5. The following classes of plastic bags are excepted from the definition of a plastic bag -

(a) plastic bags solely used to contain-

(i) fresh fish and fresh fish products,
(ii) fresh meat and fresh meat products, or
(iii) fresh poultry and fresh poultry products

provided that such bags are not greater in dimension than 225mm in width (exclusive of any gussets), by 345mm in depth (inclusive of any gussets), by 450mm in length, (inclusive of any handles);

(b) plastic bags solely used to contain the products referred to in paragraph (a) where such products are contained in packaging, (including a bag), provided that such plastic bags are not greater in dimension than the dimensions referred to in paragraph (a);

(c) plastic bags solely used to contain-

(i) fruit, nuts or vegetables,
(ii) confectionery,
(iii) dairy products,
(iv) cooked food, whether cold or hot, or
(v) ice

provided that such products are not otherwise contained in packaging and where such bags are not greater in dimension than the dimensions referred to in paragraph (a);

(d) plastic bags used to contain goods or products sold:

(i) on board a ship or aircraft used for carrying passengers for reward, or
(ii) in an area of a port or airport to which intending passengers are denied access unless in possession of a valid ticket or boarding card, for the purposes of carrying the goods on board the ship or aircraft referred to in subparagraph (i);

(e) plastic bags designed for re-use, which are used to contain goods or products and which are sold to customers for a sum of not less than 70 cent each."

This therefore, subject to two further provisions, is the legislative structure under which the levy rests. The first relates to Article 15 of the Regulations, which deals with the recovery, by the Revenue, of either non-payment or under-payments: since however this plays a central role in Issue No. 4, I will defer setting out its terms for a moment and the second point to note is that a person who fails, inter alia, to pay the levy shall be guilty of a criminal offence (s. 72(9)).

56. As above outlined, Dunnes Stores make the case that in accordance with the only meaning which they say can be attributed to s. 72(1)(b) of the Act, a bag which is not suitable for use by the customer at the point of sale cannot be the subject matter of the levy. To that they add a second stipulation, one directly sourced in Article 3(1) of the Regulations, which is, that it is only bags supplied again at the point of sale, that are captured. It is said therefore that these twin requirements of suitability at point of sale and supply at the point of sale, must exist before a bag can be regarded as a "plastic bag" for the purposes of the Regulations. (paras. 27 and 28 above)

57. The "point of sale" argument is self-explanatory and will be explored in a moment. On the "suitability" point, they suggest that before a bag can be suitable, it must be of sufficient strength and durability and must have sufficient capacity so that the customer can carry away household groceries and household staples in it. In effect, this is a reference to "carrier bags" as commonly understood. It cannot be doubted they say, but that the back of the store or the "pinch and pull" bags do not fit this purpose. Therefore, the imposition, recovery and accountability obligations contained in the Regulations cannot apply to the subject bags.

58. As previously set out, section 72(1) of the 1996 Act defines a plastic bag, which definition is carried forward to the Regulations by reason of s. 19 of the Interpretation Act 2005 ("the 2005 Act"). That section is the only real definitional section of relevance on this point. It has both an inclusive and an exclusive aspect to it. The former is that, firstly, the bag is made wholly or in part from plastic and secondly, that the bag is "suitable for use by a customer at the point of sale in a supermarket, service station or other sales outlet". Even however, if a bag satisfied both of these requirements, it will still not attract the levy if it is excluded by reference to Regulations made under s. 72 subs (1) of the Act: in effect, by Article 5 of these Regulations. It would therefore seem to follow, at least at this level of generality, that if (a) and (b) are satisfied, and if the exception does not apply, then the bag can be duly classified as being within the section.

59. Section 72(2) of the Act is not as such, a definitional section at all: it confers powers on the Minister to make Regulations in respect of the matters therein provided for. As can be seen, Article 3(1) of the Regulations mirror images that statutory provision in all of its material aspects (paras. 42 and 43 above). Thereunder, from a given date, there shall be charged, levied and paid an environmental levy "…in respect of the supply to customers, <u>at the point of sale to them of the goods or products to be placed in the bags, or otherwise</u> of plastic bags in or at a specified class or classes of supermarket, service station or other sales outlet" (emphasis added). The dispute between the parties on 'the supply at point of sale' issue centres, on what is the correct interpretation of that part of the Article which is stressed, having regard to the definition of plastic bag in s. 72(1) of the 1996 Act.

60. The learned trial judge, although acknowledging that he had some initial misgivings as to meaning and that the provision last mentioned was "somewhat awkwardly worded", nonetheless ultimately determined the issue by treating the word "otherwise" as meaning "otherwise than at the point of sale". So, in his view, the levy applied irrespective of the precise location within a supermarket where the bag was supplied or made available. In so holding, he had regard to the overall statutory scheme, saying it would be most improbable if the Oireachtas exempted from the Regulations all plastic bags other than those supplied at point of sale. He also had regard to Article 5, being the excepted provision, which in his view would have been unnecessary if the construction as advanced by Dunnes Stores was intended: finally, he found support for this conclusion by reference to Council Directive 91/156/EEC of the 18th March 1991 amending Directive 75/442/EEC on Waste ("the Directive").

61. At the outset, it must be said that both the relevant sections of the Act and those of the Regulations are difficult to construe. This may in part stem from the unusual nature of the levy system. As appears from what is above set out, the relevant measures in their final form do a number of things:-

    (i) They make an accountable person directly responsible for the payment of the levy to the Revenue Commissioners: this whether the customer is charged an equivalent amount on all applicable occasions, or on some only or indeed if at

all. It is therefore not simply a collection device. If the obligation had stopped at this point, the supplier of goods or products could have subvented in whole or in part the levy cost to the customer. But the obligation went further.

(ii) It obliged that person to charge the customer an amount equivalent to the levy: so the subvention option as a matter of choice was not available. If operated in this manner the ultimate liability for the basic amount specified in Regulation 4 should always be that of the customer.

Notwithstanding this allegation however, the direct liability obligation remains which means that these must be regarded as taxation measures.

62. In such circumstances one would have thought and one is entitled to expect, that the imposing measures should be drafted with due precision and in a manner which gives direct and clear effect to the underlying purpose of the legislative scheme. That can scarcely be said in this case. That being so, the various imposing provisions must be looked at critically. If however having carried out this exercise, and notwithstanding the difficulty of interpretation involved, those provisions, when construed and interpreted appropriately, are still capable of giving rise to the liability sought, then such should be so declared.

63. As has been said time and time again, the focus of all interpretive exercises is to find out what the legislature meant: or as it is put, what is the will of Parliament. If the words used are plain and their meaning self-evident, then save for compelling reasons to be found within the instrument as a whole, the ordinary, basic and natural meaning of those words should prevail. "The words themselves alone do in such cases best declare the intention of the law maker" (*Craies on Statutory Interpretation* (7th Ed.) Sweet & Maxwell, 1971 at pg. 71). In conducting this approach "…it is natural to inquire what is the subject matter with respect to which they are used and the object in view" *Direct United States Cable Company v. Anglo – American Telegraph Company* [1877] 2 App. Cs. 394. Such will inform the meaning of the words, phrases or provisions in question. *McCann Limited v. O'Culachain* (Inspector of Taxes) [1986] 1 I.R. 196, per McCarthy J. at 201. Therefore, even with this approach, context is critical: both immediate and proximate, certainly within the Act as a whole, but in some circumstances perhaps even further than that.

64. Where however the meaning is not clear, but rather is imprecise or ambiguous, further rules of construction come into play. Those rules are numerous both as to their existence, their scope and their application. It can be very difficult to try and identify a common thread which can both coherently and intelligibly explain why, in any given case one particular rule rather than another has been applied, and why in a similar case the opposite has also occurred. Aside from this however, the aim, even when invoking secondary aids to interpretation, remains exactly the same as that with the more direct approach, which is, insofar as possible, to identify the will and intention of Parliament.

65. When recourse to the literal approach is not sufficient, it is clear that regard to a purposeful interpretation is permissible. There are many aspects to such method of

construction: one of which is where two or more meanings are reasonably open, then that which best reflects the object and purpose of the enactment should prevail. It is presumed that such an interpretation is that intended by the lawmaker.

66. Another general proposition is that each word or phrase has and should be given a meaning, as it is presumed that the Oireachtas did not intend to use surplusage or to have words or phrases without meaning. Therefore, every word or phrase, if possible, should be given effect to. (*Cork County Council v. Whillock* [1993] 1 I.R. 231). This however, like many other approaches may have to yield in certain circumstances, where notwithstanding a word or phrase which is unnecessary, the overall meaning is relatively clear-cut. However, it is abundantly clear that a court cannot speculate as to meaning and cannot import words that are not found in the statute, either expressly or by necessary inference. Further, a court cannot legislate: therefore if, on the only interpretation available the provision in question is ineffectual, then subject to the Interpretation Act 2005, that consequence must prevail.

67. I mention the 2005 Act because of what s. 5 states: it reads:-

> "5.—(1) In construing a provision of any Act (other than a provision that relates to the imposition of a penal or other sanction)—
>
> (a) that is obscure or ambiguous, or
>
> (b) that on a literal interpretation would be absurd or would fail to reflect the plain intention of—
>
> (i) in the case of an Act to which paragraph (a) of the definition of "Act" in section 2 (1) relates, the Oireachtas, or
>
> (ii) in the case of an Act to which paragraph (b) of that definition relates, the parliament concerned,
>
> the provision shall be given a construction that reflects the plain intention of the Oireachtas or parliament concerned, as the case may be, where that intention can be ascertained from the Act as a whole."

Subsection (2) makes similar provision in respect of a statutory instrument, but again excludes from its application any such provision which relates to the imposition of a penal or other sanction.

68. It is alleged on behalf of Dunnes Stores that s. 72 of the 1996 Act and by extension the Regulations enacted to give effect thereto, are of a penal nature or otherwise impose a sanction: accordingly, in their view the section has no application to this case. This is a point I will return to in a moment.

69. Aside from the provisions of s. 5 of the 2005 Act, but in a closely related context, there is the case, cited by both parties of *Inspector of Taxes v. Kiernan* [1981] I.R. 117. It is a case of general importance, where the Court was called upon to determine whether the word "cattle" in s. 78 of the Income Tax Act 1967, could be read as including "pigs".

Henchy J. in his judgment made three points of note. The first of these he stated as follows:

> "A word or expression in a given statute must be given meaning and scope according to its immediate context, in line with the scheme and purpose of the particular statutory pattern as a whole, and to an extent that will truly effectuate the particular legislation or a particular definition therein."

The learned judge went on to discuss when and in what circumstances a word should be given a special meaning, in particular a word or phrase which was directed to a particular trade, industry or business. At pp. 121 and 122 he quoted the words of Lord Esher M.R. in *Unwin v Hanson* [1891] Q.B. 115 at 119, who said :-

> "If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with that trade, business or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words."

The other interpretative rule which Henchy J. also referred to is the presumption against double penalisation or put in a positive way, there is an obligation to strictly construe words in a penal or taxation statute. In this context he said:-

> "Secondly, if a word or expression is used in a statute, creating a penal or taxation liability, and there is looseness or ambiguity attaching to it, the word should be construed strictly so as to prevent a fresh imposition of liability from being created unfairly by the use of oblique or slack language…as used in the statutory provision in question here, the word "cattle" calls for such a strict interpretation."

70. The point first made is of common application: a provision should be construed in context having regard to the purpose and scheme of the Act as a whole, and in a manner which gives effect to what is intended. The second point does not appear relevant in that although the Regulations refer to "any shop, supermarket, service station or other sales outlet", those even with an intimate knowledge of the business conducted therein, including of course the goods and products on offer would not necessarily, indeed not at all, have an understanding of what a plastic bag is for the purposes of the Regulations. In any event, the phrase is statutorily defined and effect must be given to that. The third is designed to prevent the fresh imposition of a liability where such a burden could only be achieved by an interpretation not reasonably open, by the standard principles of construction above mentioned.

71. Even in the context of a taxation provision however, and notwithstanding the requirement for a strict construction, it has been held that where a literal interpretation, although technically available, would lead to an absurdity in the sense of failing to reflect what otherwise is the true intention of the legislature apparent from the Act as a whole, then such will be rejected. An example is *Kellystown Company v. H. Hogan, Inspector of*

Taxes, [1985] I.L.R.M. 200, a case involving potential liability for corporation profit tax: Henchy J. speaking for this Court at p. 202 of the report, said:-

> "The interpretation contended for by *Kellystown*, whilst it may have the merit of literalness, is at variance with the purposive essence of the *proviso*. Furthermore, it would lead to an absurd result, for monies which are clearly corporation profits would escape the tax and, indeed, the tax would never be payable on dividends on shares in any Irish company. I consider the law to be that, where a literal reading gives a result which is plainly contrary to the legislative intent, and an alternative reading consonant with that legislative intent is reasonably open, it is the latter reading which must prevail."

72. Finally, could I mention the following passage from *McGrath v. McDermott*, [1998] I.R. 258, at 276:

> "The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it."

As the identity of the defendant discloses, that was also a taxation measure.

73. Two introductory points, if I may, should be made about both s. 72 of the Act and Article 3 of the Regulations. The phrase in s. 72(1)(b), that the bag is "suitable for use by a consumer at the point of sale" is not and could not be regarded as one without obvious meaning. It is at that point that the crossflow or mutual transaction takes place. Prior to then, a bag which otherwise would qualify does not attract the levy until the transaction of sale and purchase takes place and unless the qualifying bag is included. Prior to that point a customer may use a "levy bag" for certain goods or products which she/he intends to purchase but then changes his/her mind or else may simply decide that the bag is unsuitable and leaves it within the store. In such circumstances the levy would not be payable. Therefore, the reference to "suitability for use" at that point is understandable in this way. Further, it is important to note in a slightly different context that this provision does not state that the bag in question has to be supplied at the point of sale: rather it simply says it must be suitable for use at that point.

74. Every consumer has at least a broad understanding of what to expect or even demand of a retail outlet, certainly of a large supermarket. Accordingly, given the nature of the business it would be quite surprising if supermarkets did not have available bags suitable for use in respect of different goods or products of a varying type. Equally so, it would make no sense if a customer of a supermarket decided to use or take possession of a bag that was unsuitable to the type of products generally available in that outlet or to those then intended to be purchased. Accordingly, I am therefore not concerned that s. 71(b) of the Act, as such, at least if viewed on its own, creates a particular difficulty in this case.

75. Leaving aside the words "or otherwise" for a moment, I do not believe that Article 3 of the Regulations, in its ordinary and natural meaning, applies only where plastic bags are supplied to customers at the point of sale. The relevant wording is "in respect of the supply to customers, <u>at the point of sale to them of goods or products to be placed in the bags,</u> or otherwise of plastic bags in or at any shop…" (emphasis added). The subject matter of the sale referred to are the goods or products to be placed in the bags, but not the bags of themselves. Therefore, the location of supply is not necessarily circumscribed by this phrase.

76. In any event, the Article, quite evidently, could have been drafted in more clear-cut terms. In order to try and identify its true meaning, a number of wording variations have been suggested. These are as follows:

(1) in respect of the supply to customers of plastic bags in or at any shop, supermarket etc., (this simply deletes the wording within the commas and also "or otherwise")
(2) in respect of the supply to customers at the point of sale or otherwise of the plastic bags in or at any shop, supermarket etc., (this relocates "or otherwise")

Perhaps there are other versions or variants also but certainly both of these versions would have achieved greater clarity as to meaning. That however cannot be an end to the exercise: in such circumstances, it is I think permissible in construing the actual wording used to have regard to the purpose and intention of the Act as a whole.

77. The preamble to the 1996 Act indicates that the measures enacted related to the prevention, management and control of waste and that such measures were intended to give effect to Council Directive 75/442/EEC of the 15th July, 1975, as amended by Council Directive 91/156/EEC of 18th March, 1991, on waste. Even disregarding s. 7 and 29 of the 1996 Act, it appears quite evident that by virtue of s. 72, the intention of the Oireachtas was to make provision for the imposition of an environmental levy in respect of plastic bags so defined in the sales outlets as mentioned. The purpose of these provisions was clearly intended to prevent and/or reduce the extent of plastic bag wastage, as at that time such wastage was perceived to be an ever-increasing problem in this jurisdiction. In that context, I agree with what the learned trial judge said at pp. 40 and 41 of this judgment, to the effect "The point of the statutory provision (s. 72) is to reduce as much as possible the presence of discarded plastic bags littering our towns and countryside". Accordingly, at least at a broad and general level, this cannot be doubted.

78. Of the numerous variations which have been canvassed during the course of debate, the ultimate argument addressed two possible interpretations only. The first is that as contended for by the Revenue Commissioners. In effect, the phrase "or otherwise" qualifies "the point of sale". The latter is specific as to location, whereas the addition of the former generalises the location and extends it to any place within an outlet where prescribed bags are supplied. Dunnes Stores on the other hand suggest that the words "or otherwise" qualify not point of sale, but the goods or products to be placed in the

bags. In giving some sense to this, they suggest that customers might obtain bags which however they would not use in connection with the products or goods purchased in that outlet. This in its own right is very difficult to understand. They support it however by the placement of the comma immediately before "or otherwise".

79. It would have made very little sense for the Oireachtas, in the knowledge of what it was attempting to do, to put in place legislation which exempted from the levy every and any bag unless such bag was sold at the point of sale. This would have the effect that those in charge of any and all outlets could place such bags anywhere other than the point of sale, and by doing so would dis-apply the levy. Unless absolutely compelled to adopt such an interpretation, I would have to reject it.

80. In addition, however, such an interpretation would render entirely redundant the excepted provisions contained in Article 5 of the Regulations. Whilst I fully accept that primary legislation cannot be interpreted via the Regulations, nonetheless in this particular instance such regulations, at least insofar as the exempted class of bag is concerned, forms part of the statutory definition. So, in my view, Article 5 cannot be ignored. Quite evidently in the vast majority of cases, the bags so specified are provided throughout the store: therefore, making specific provision for their exclusion would not be required if the appellant's argument is correct. I therefore have to reject this primary contention made on behalf of Dunnes Stores and come to the conclusion that the phrase "or otherwise" can, in accordance with traditional methods of interpretation, be read as qualifying simply the point of sale.

81. In holding as I have, I wish to emphasise the point made at para. 61 above, where I have said that this issue has posed considerable interpretive difficulties, which could and should have been avoided. In effect, I am acknowledging that the meaning which I have ascribed to the measures in question, can in some respects be said to have some surplusage within it. This is never an attractive approach to an interpretive issue. The suggestion by the Revenue that the phrase "…at the point of sale to them of the goods or products to be placed in the bags, or otherwise", can be explained as being demonstrative of the subject matter which the measures are intended to cover, is not altogether satisfactory. It is therefore necessary to state that there are well defined limits beyond which a court will not go when trying to interpret a provision, certainly one which imposes a taxation liability. The conclusion so reached is, as previously explained, within the accepted method of interpretation but not by an appreciable margin. In conclusion however, I would dismiss the appeal on this aspect of the case.

Issue No. 2 – the Classification Point:

82. Another argument advanced on behalf of Dunnes Stores is that the Minister is in breach of s. 72(2) of the 1996 Act, in that he has failed to specify what "class or classes" of supermarket, service station or other sales outlet the levy is to apply to. In their view the Minister was obliged, for policy reasons, to engage in a defining exercise of nominating a class or classes of sales outlet to which the Regulations would apply. They say that if the Oireachtas had intended that the levy should apply to all outlets it would have simply said

so. By reason of his failure in this respect, the Minister has acted in a broad-brush manner which is *ultra vires* the parent section.

83. This submission in my view is without substance. If the Minister is entitled without limitation to specify such class or classes, then he is entitled to specify all such outlets in this regard. Consequently, I cannot see any merit in this point.

Issue No. 3 – Fair Procedures:

84. This third issue which was canvassed before Hedigan J. has been revisited by the appellant in the within appeal: it is that the Revenue Commissioners have acted in breach of fair procedures and/or in breach of natural and constitutional justice, and also in breach of section 3 of the European Convention of Human Rights Act 2003, by refusing to provide adequate details of the basis on which the Assessments had been calculated.

85. The fair procedures argument as presented by the appellant must be viewed, as Hedigan J. did, in a very fact-specific context. Their circumstance is one which cannot necessarily be compared, either directly or mutatis mutandis to the circumstances of any of the parties in the cited authorities. It is obvious as the trial judge has said, that Dunnes Stores have available to it a level of resources and legal advice right throughout these proceedings. Therefore, any comparison with cases such as *Keogh*, becomes less useful as that individual and many other lay people may have had little or no professional advice about the formulation of an appeal, or the time limits involved etc. In fact, *Keogh*, apart from the validity of this distinction, has no relevance to the instant appeal: Mr. Keogh was successful in persuading this Court that CAB, as the Revenue Commissioners, had breached an assurance given to all taxpayers in their published Tax Payers Charter, but which for him had personal significance. The Charter does not feature in this case.

86. In relation to the Convention argument, Hedigan J. rejected the appellant's submission in this regard on the basis of the public law nature of this appeal. As stated, he relied on *Fortune* in arriving at this conclusion.

87. The facts and circumstances giving rise to the proceedings taken by Mr. Fortune are not of direct relevance, save to note that he sought to quash an assessment raised by the Revenue Commissioners which would have the effect of withdrawing tax relief which previously had been granted to him pursuant to s. 35 of the Finance Act 1987. Having dealt with several of the arguments advanced on his behalf, O'Neill J. at p. 30 of the judgment said the following: -

> "Article 6 of the European Convention on Human Rights guarantees due process in civil and criminal cases. It provides, *inter alia*, that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". However, it has long been accepted by the European Court of Human Rights that Article 6 has no application whatsoever in respect of proceedings relating to the assessment or imposition of tax. Article 6(1) applies to determinations of "civil rights and obligations or of any criminal charge". Public law matters such as tax matters

are excluded as was confirmed by the European Court of Human Rights in *Ferrazzini v. Italy* [2002] 34 E.H.R.R. 45. Accordingly, the applicant's argument under Article 6 must fail."

88. It is true to say that the passage quoted reflects what has been always considered to be the historical situation regarding the obligation to pay tax. *Ferrazzini v. Italy* is indeed authority for this proposition. However, as with the rest of the Convention, Article 6 is dynamic in its operation and whilst the stated position has remained thus for a considerable period, I would not want to concede that such is incapable of modification or alteration in the future. Interestingly enough, in contrast to *Ferrazzini*, in *Schouten & Meldrum v. Netherlands* (App. Nos. 19005/9 & 19006/91) (Unreported, European Court of Human Rights, 9th December, 1994), followed in *Meulendijks v. Netherlands* (App. No. 34549/97) (Unreported, European Court of Human Rights, 14th May, 2002), the court held that Article 6 did apply to the applicants' obligation to pay social security contributions. In so doing it followed the approach previously used in *Feldbrugge v. Netherlands* (App. No. 8562/79) (Unreported, European Court of Human Rights, 20th May, 1986) and decided that the private law features of the obligation outweighed its public law features. Consequently, I would not wish to be taken as specifically endorsing, in all circumstances, the citation from *Fortune*.

89. Even however if I am incorrect in this reservation, and if *Fortune* is and remains good law, I am satisfied that it is not necessary for Dunnes to rely upon the Convention to raise this fair procedure point. That issue arises in the context of an administrative decision, albeit one authorised by express statutory provision. It cannot in my view be doubted but that the Revenue Commissioners, when carrying out their statutory powers and duties are bound in principle to apply procedural fairness. Therefore, the argument on this aspect is well covered and can be adequately dealt with at this level as distinct from having to rely on the Convention.

90. On the factual side, Dunnes Stores say that at the end of months of correspondence, submissions and meetings between the parties, they have been left in a state of uncertainty as to the basis upon which the Assessments were raised. For their part the Revenue Commissioners say that during this process the appellant could have been left in no doubt about how and in what way the Revenue had approached this matter. It was not for the trial court and indeed is not for this Court to analyse that conflict in a way in which trial courts do when it becomes necessary to favour one version of a factual background, as against another. Matters can be considered as they have been asserted.

91. Assuming for a moment that the argument of Dunnes Stores is well founded, they submit that such has had for them consequences of not being able to fully articulate the grounds of their appeal, which presently stands adjourned before the Appeal Commissioners. In effect, the notice of appeal has been compromised.

92. There is no doubt but that the appeal body has to apply fair procedures from the inception of the process right throughout the hearing, up to and including finality. Whilst this will become a matter for the parties and the Appeal Commissioners, nonetheless it

seems reasonable to assume that if after this judgment there remains any issues to be determined on the "liability side", then that exercise would be conducted first. Thereafter, the question of quantum would arise and in such context it would be open to Dunnes Stores to make any submission it thought prudent and worthwhile to the effect that by reason of procedural unfairness, they have been disadvantaged in pursuing in their appeal in a just and fair manner. As the Commissioners are a body with expert knowledge in dealing with taxation appeals, it seems to me that the most appropriate forum in which to pursue the fairness issue if it should remain alive, is before that body. Accordingly, I would not grant any relief under this heading of claim.

Issue No. 4 – The Unconstitutionality Argument:

93. The appellant has challenged the constitutionality of s. 72(5)(b) of the 1996 Act on two main grounds:

a)(i) That the section constitutes an impermissible delegation of legislative power to the Minister, by allowing him to amend or to adapt the provisions of any enactment, including primary legislation, relating to the estimation, collection and recovery of tax and to extend such provisions to the collection of the Levy;

(ii) Even if they are incorrect in this regard, they allege that the Regulations are certainly *ultra vires* because they clearly have this effect. *Harvey v. Minister for Social Welfare* [1990] 2 I.R. 232, and;

b) That the legislation fails to set out principles and policies and that as such, the test established in *Cityview Press Ltd v An Chomhairle Oiliúna* [1980] I.R. 381 has not been satisfied.

94. It is very difficult to see how the substantive constitutional challenge can be terminated on the basis that Dunnes Stores have not asserted a sufficient standing to mount the claim. Section 72(5)(b) of the 1996 Act, is one of the conferring powers by which, through the Regulations, the Assessments were raised in this case. Furthermore, that section, together with Regulation 6 imposes a direct liability on the appellant to discharge the levy. In addition, if that provision had not existed, then quite evidently the powers of estimation and recovery given to the Revenue would have had no statutory basis to them. Irrespective of the amount involved, though it must be said that the figure is substantial, the Assessments operate to impose a liability in this instance personal to Dunnes Stores. If as they suggest, the entire basis of using the tax code to collect the levy is unconstitutional, then it must be accepted that their property rights have been interfered with. Consequently, I cannot accept the argument of the respondents in this regard.

95. The text of Article 15.2.1° is unequivocal in vesting the "sole and exclusive" power of law-making in the Oireachtas, with no other legislative authority having power to make laws for the State. This is the basic rule and premise from which to begin, before turning to examine any secondary or delegated legislation and the legality of same. Countless cases have seen Article 15 being invoked to challenge certain State activity which may be unauthorised by statute and as such is unconstitutional (see *O'Neill v Minister for*

Agriculture and Food [1998] 1 I.R. 539, *Dunne v Donohoe* [2002] IESC 35, [2002] 2 I.R. 533).

96. The first attempt made to block an executive or ministerial function on the ground that it represented an unconstitutional usurpation of legislative power was *Pigs Marketing Board v Donnelly* [1939] I.R. 413, in which the issue was the price-fixing function given to the Board by the Pigs and Bacon Acts 1935 and 1937. Hanna J. rejected the argument, and in doing so, gave a succinct summary of the position in relation to delegated legislative power, at p. 421: -

> "It is axiomatic that the powers conferred upon the Legislature to make laws cannot be delegated to any other body or authority. The Oireachtas is the only constitutional agency by which laws can be made. But the Legislature may, it has always been conceded, delegate to subordinate bodies or departments not only the making of administrative rules and regulations, but the power to exercise, within the principles laid down by the Legislature, the powers so delegated and the manner in which the statutory provisions are to be carried out."

97. It is worthwhile once again to set out the wording of s. 72(5) as this provision is central to Issue No. 4. It reads:-

> "72- (5) Regulations under subsection (2) shall provide for the following matters –
>
> (a) the specification of person or persons to whom the levy shall be payable (who or each of whom is referred to in this section as a "collection authority"),
>
> (b) the conferral of powers on a collection authority with respect to the collection and recovery of the levy (and, for this purpose, the Regulations may adapt with or without modifications, the provisions of any enactment relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment)."

98. Regulation 15 of the 2001 Regulations read as follows:-

> "15.(1) Without prejudice to any other mode of recovery, the provisions of any enactment relating to the recovery of income tax and the provisions of any rule of court so relating shall apply to the recovery of any levy payable as they apply in relation to the recovery of income tax.
>
> (2) In particular and without prejudice to the generality of sub-Article (1), that sub-Article applies the provisions of sections 962, 963, 964(1), 966 and 1002 of the Tax Consolidation Act 1997.
>
> (3) In proceedings instituted for the recovery of any amount of levy –

(a) a certificate signed by an office of the Revenue Commissioners which certifies that a stated amount of levy is due and payable by the defendant shall be evidence, until the contrary is proved, that this amount is so due and payable, and

(b) a certificate certifying as aforesaid and purporting to be signed by an officer of the Revenue Commissioners may be tendered in evidence without proof and shall be deemed, until the contrary is proved, to have been signed by an officer of the Revenue Commissioners.

(4) Subject to this Article, the rules of the court concerned for the time being applicable to civil proceedings shall apply to proceedings by virtue of this Article."

99. There are two main ways in which the Article 15.2.1° case-law appears before the courts: the first is the principle that the Oireachtas may not delegate the power to make, repeal or amend legislation and the second is the 'principles and policies' criteria. While the 'principles and policies' rule forbids administrative bodies from making laws which do not build upon the guidelines and aims set out in primary legislation, the rule against amending primary legislation is perhaps more categorical, as it prohibits any such amendment of what has been set out by the legislature.

Principles and Policies

100. The historical formulation of the test commonly known as the 'principles and policies test' was that originally set out in *Cityview Press Ltd. v. An Chomhairle Oiliúna* [1980] I.R. 381 ("*Cityview Press*"). The plaintiffs challenge in that case, to the provisions of the Industrial Training Act 1967, was rejected by this Court, who recognised that a delegation of power by the Oireachtas was necessary and attractive, due to the ever-changing and complex situations which face both the legislature and the executive arm of the State. In so deciding, it held that where the impugned measure is more than a mere giving effect to the principles and policies which are contained in the statue itself then it will constitute an unauthorised delegation of power. However, if the substantive law is laid down in the statute and the details are simply left to the Minister or subordinate body to articulate, no issue arises. While the test is well-known as a tenet of a challenge to the constitutionality of any legislation, it is interesting to note that it took some time before any law was declared unconstitutional on foot of the *Cityview* criteria.

101. *Laurentiu v Minister for Justice* [1999] 4 I.R. 26, was the first case in which the principles and policies test was successfully invoked in such a way as to invalidate legislation under Article 15.2.1°. Section 5(1)(e) of the Aliens Act 1935 allowed the Minister to 'make provision for the exclusion or the deportation' of aliens. This Court found the complete absence of principles and policies to be fatal for the survival of the section. Denham J., as she then was, observed the lack of "standards, goals, factors and purposes".

102. In a much more recent iteration of the primary/secondary legislation issue, this time in the context of EU law, O'Donnell J., in *O'Sullivan v Sea Fisheries* [2017] IESC 75, [2018] 1 I.L.R.M. 245, commented that the question to be answered was whether the scope of the decision making left to the subordinate legislation was too wide. In so stating, he

observed that the whole and entire point of delegating legislation was surely to leave some choice to the subordinate body. If the primary legislation dictated every outcome, then the benefit would be lost. He suggested that the test in relation to Article 15.2.1° be approached negatively, i.e. is the area of rulemaking delegated so broad as to constitute a trespass by the delegate or subordinate area on an area reserved to the Oireachtas?

Amendment of primary legislation

103. A particular name is often given to clauses which in primary legislation give secondary legislation the power to amend: "Henry VIII clauses", after the power given to Henry VIII in the Statute of Proclamations 1539, to legislate by proclamation. To allow primary legislation to be amended by secondary legislation is not permissible, even where it seems that the primary legislation has specifically allowed it. The case law however does draw a distinction between cases in which the legislation has made an invasion of the legislative function necessary and inevitable, and cases in which the power delegated, if exercised properly, remains constitutional and permissible, this of course as a result of primary legislation enjoying the presumption of constitutionality. As a result of this, the majority of the challenges brought against these kinds of provisions lead the court to find the secondary legislation to be ultra vires as opposed to finding the primary legislation constitutionally problematic.

104. In *Cooke v Walsh* [1984] I.R. 710, the plaintiff, an infant, had been injured in a road traffic accident. Section 45 of the Health Act 1970 entitled a "fully eligible" person to avail of free medical care, however the Minister for Health had, under s. 72 of the same Act created a Statutory Instrument which excluded any person who had suffered their injuries as a result of a road traffic accident from this category of "fully eligible". O'Higgins C.J. stated that it was necessary to view and interpret s. 72 in a way which would not mean that the Oireachtas had intended to delegate its law-making function. In his view, s. 72 allowed the Minister to make regulations permitting health boards not to provide certain kinds of services to persons of limited eligibility but this was not the same as giving him the power to amend s. 45. The regulations made under s. 72 however, were deemed *ultra vires.*

105. Similarly, in *Harvey v Minister for Social Welfare* [1990] 2 I.R. 232, a case cited by both of the within parties, s. 75 of the Social Welfare Act 1952 was challenged by the applicant on the basis that it allowed the Minister to make regulations which would override provisions of the primary legislation. The Minister had then made Regulations which withdrew social welfare payments from the applicant who would otherwise have been entitled to them. Finlay C.J. followed the reasoning of *Cooke*, upheld the constitutionality of the section but condemned the Regulations as being ultra vires. The judgment of the learned Chief Justice states that, though s. 75 did give a very wide scope and broad discretion to the Minister, the power given was capable of being exercised in the correct fashion, *i.e.* in a regulatory or administrative capacity only.

106. In *Minister for Justice, Equality and Law Reform v Tighe* [2008] IEHC 118, 27 I.L.T. 155 ("Tighe"), a High Court decision of Feeney J., the distinction was drawn between allowing a Minister or subordinate body to amend primary legislation and to modify primary

legislation. Section 24 of the Criminal Justice Act 1994 provided that only the DPP could make an application for a restraint order preventing "realisable property" from being dealt with or diminished in value by an individual. Section 46(6) then allowed the Government, by way of regulations, to "make such modifications as appear to it to be necessary or expedient for the purpose of adapting to confiscation co-operation orders any of the provision of this Act relating to confiscation orders". Regulations were then made which gave power to the Minister to make such an application, rather than the DPP. Feeney J., in upholding both the primary legislation and the regulations, stated that the regulations made under the section were to be viewed not as amendment of primary legislation, but rather as a necessary modification for the specific purpose of the legislation.

107. Given that the wording of the s. 24 explicitly states that applications could only be brought by the DPP, it seems that the regulation was surely more than a modification, as the principle espoused in the statute was altered to allow another executive office entirely to become involved with applications of this nature. Feeney. J., however felt that s. 46(6) of the Act contained sufficient principles and policies for the test to be satisfied, though he does not engage in much analysis on this point.

108. A similar situation arose in *Mulcreevy v Minister for Environment* [2004] IESC 5, [2004] 1 I.R. 72 ("*Mulcreevy*") a case which came before *Tighe*, and in which this Court took quite the opposite view. The applicant took issue with orders made in relation to the National Monuments Act 1930, as amended, in which the function of the Commissioner for Public Works of consenting to the alteration of national monuments, was transferred to the Minister for the Environment. The Court held that it was an "almost inescapable" conclusion that the order had amended the act and that the section had not, when construed in accordance with Article 15.2.1°, conferred any power on the Minister to make an order of such effect.

109. When examining whether a particular provision results in an amendment of primary legislation, the question to be asked is whether the amendment frustrates, violates or changes the meaning and operation of the primary legislation, or whether the amendment in fact is necessary, in order to give effect to it. Cases such as *Mulcreevy* where a clear rule was established in the parent legislation, only to be changed by the regulation, evidently constitutes an impermissible Henry VIII clause which attempted to override the law-making function of the Oireachtas. However, in a case such as *Harvey,* the power given was, when properly construed, not capable of amending or overriding the parent legislation: it was simply the manner in which the Minister had made regulations which constituted an *ultra vires* use of delegated legislative power which led to the problem.

110. The questions to be answered in relation to the provisions at issue in the within appeal, are firstly, whether allowing the Minister to "adapt with or without modifications", the provisions of "any enactment" relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment (s. 72(5)(b) of the Act), constituted an impermissible

delegation of legislative power. Secondly, whether there are sufficient principles and policies contained in the primary legislation to satisfy the criteria set out in *Cityview.*

111. At the outset, it seems to me that the Oireachtas had a number of ways to achieve the end point which Regulation 15 of the Regulations has purported to do. Firstly, no objection could be taken if in fact those provisions of the Taxes Consolidation Act 1997, which are referenced in Regulation 15, were specifically set out in the 1996 Act. Secondly, it likewise seems to me that the Oireachtas could have specified a series of provisions from the 1997 Act and conferred on the Minister the power to apply such one or more of those provisions as he thought fit. If either of those methods had been adopted, it is very difficult to see how a complaint could be made in respect of them.

112. On a closer look, subs (5)(b) of s. 72 permits the Minister to confer powers on the specified Collection Authority for the purposes of collecting/recovering the levy. The Minister is also authorised to utilise existing statutory provisions but only those relating to the "estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax". It is for these purposes and no other that the Minister is given power to "adapt" the taxation provisions.

113. The Regulations, in large part, address the matters set out in s. 72(6). The specific references to statutory provisions are in respect of recovery (Article 15) and appeals (Article 16). The only reference to "modification" is in respect of the procedures relating to estimates and appeals. That does not mean that the TCA provisions are amended or modified. It means that the procedures therein set out are to be applied but can be modified where necessary but solely in this context and for this purpose. The Regulations do not alter the content of those provisions. Rather, they determine the extent of the application of that content in a context where the provisions would not otherwise apply at all. There is therefore in my view, no question of there being a power to create secondary legislation which purports to amend any provision of primary legislation. It is therefore not a "Henry VIII" type situation in the first instance.

114. With regard to the "principles and policies argument", it is clear that the Oireachtas has authorised the Minister to select from amongst existing provisions dealing with the estimation, collection or recovery of taxes, those provisions which he considers appropriate to the estimation, collection and recovery of this tax. He may then by statutory instrument apply them to the purposes of the levy and if necessary, modify them in order to enable that application. consequently, I see no difficulty in this regard.

115. In *Mulcreevy,* which is above mentioned, the then Chief Justice, Keane C.J., succinctly encapsulated the position when he said "but is also clear that such delegated legislation cannot make, repeal or amend any law and that, to the extent that the parent Acts purport to confer such a power, it will be invalid having regard to the provisions of the Constitution". It is of course true that in accordance with the principle of double construction, where it is possible to interpret a provision which does not have this effect, then that should be preferred. In this case however, the wording of s. 72(5)(b) is, I think, reasonably clear. It confers on the Minister powers to make Regulations which "adapt,

with or without modifications, the provisions of any enactment relating to the estimation, collection and recovery of, or the inspection of records or the furnishing of information in relation to, any tax charged or imposed by that enactment”. It seems to me that, when the full context is considered the use of the word “adapt” in the section does not include the power to amend primary legislation in the manner suggested. In conclusion therefore, I am satisfied that s. 72(5)(b) of the 1996 Act is not unconstitutional either as infringing Article 15.2.1° of the Constitution or the principles and policies test.

Conclusion

116. Accordingly, for the reasons above given, I would dismiss this appeal.