Appeal No. VA96/3/010

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 1988

VALUATION ACT, 1988

Kerry Foods **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Warehouse at Lot No: 19B, Townland: Dunkitt, ED.: Dunkitt, RD.: Waterford II, Co. Kilkenny
Notification of Revision under Section 3, 1988 Valuation Act

B E F O R E

Fred Devlin - FRICS.ACI Arb.	**Deputy Chairman**
Brid Mimnagh - Solicitor	**Member**
Rita Tynan - Solicitor	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 14TH DAY OF JULY, 1997

By Notice of Appeal dated the 16th day of July 1996 the Appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £110 on the above described hereditament.

The grounds of appeal as set out in the Notice of Appeal are that:-

"Kilkenny County Council has failed to discharge its statutory obligations under the provisions of *Section 3 & 4 of the Valuation Act, 1988*."

The appeal proceeded by way of an oral hearing which took place in Dublin on the 19th day of March, 1997. Mr. Andrias O'Caoimh S.C., instructed by Mr. Michael O'Donoghue, Solicitor with Mr. Joseph Bardon FRICS, FSCS of Bardon & Company appeared on behalf of the Appellant company. Mr. Patrick Kyne, BE, ARICS, Chartered Surveyor appeared on behalf of the Respondent. Also present was Mr. John B. Harte, Solicitor of James Harte & Son on behalf of Kilkenny County Council.

In opening the submission on behalf of the Appellant company, Mr. O'Caoimh indicated that the property had never previously been valued and the Local Authority had requested a revision in 1994. He indicated that under *Section 3 of the 1988 Act* a notification issued on the 30th May, 1994 from Kilkenny County Council and under *Section 3(2)(b)* of the said Act, that the list requiring revision of all properties listed within the previous month, must be published. In his submission, Mr. O'Caoimh indicated that there was wrong notification given and it referred to the wrong property. He further indicated that when the matter was later queried by the Appellant's through their professional advisors, the documentation purporting to be a copy of that issued on the 30th May, 1994, could not have been so, as the lot number in the townland of Dunkitt was only created at revision stage and was not in existence on the said date. He further submitted that, should an occupier cite a wrong lot number, they would receive little sympathy from the Commissioner and he referred to the case of ***Kildare County Council v. Great Southern Railways [1901] ILRM p.205-252***. In that case a request for a revision emanated from Kerry County Council and the Commissioner sought to revise the entire railway line, which included a portion which passed through County Kildare. As a result the valuation of the portion in the County of Kildare was reduced. Kildare County Council appealed the valuation to the County Court but did not cite want of jurisdiction as a ground of appeal. The County Court Judge affirmed the valuation as to the main line but varied it as to the branch line within the county. On an application for a writ of certiorari to quash the revised valuation lists it was held by Palles C.B. in the Queen's Bench Division that the revision of the portion of the railway in the County of Kildare, not having been made upon any application by any ratepayer or collector in that county, was made without jurisdiction. On appeal in the Court of Appeal, Holmes L.J., held that Kildare County Council were estopped by their conduct from raising the question of jurisdiction. Mr.

O'Caoimh further referred to the judgement of Lord Justice Holmes in the ***Great Southern Railways*** case wherein he set out the provisions relating to the revision of valuation. The Lord Justice referred to the fact that revisions can be periodic or annual. In regard to the annual revision, the Commissioner does not undertake this on his own initiative but is put in action by persons interested. Every collector of rates is bound to send to the County Council a list of the tenements and hereditaments within his district that require revision and any ratepayer may deliver a similar list. Such lists are left open for public inspection. The Commissioner is bound to make out a full and complete list of all tenements and property mentioned in the lists furnished to him and transmit same to the County Council by whom publication is to be made. The valuation, according to Holmes, L J. was a judicial act with the result of imposing liability on or affecting the rights of members of the public.

Mr. O'Caoimh submitted that the nature of the 1988 Act is essentially the same and while there is no publication required, notification is provided for where the owner or occupier is known. He contended that there was failure to comply with these provisions in this case.

Having taken the oath, Mr. Bardon adopted his précis as his evidence in chief and indicated that the previous lot had been lot number 19 owned by Mr. Walsh of approximately 19 acres, of which Kerry Foods purchased one acre or thereabouts. He further indicated that lot 19b was created in the fourth quarter of 1994 and lot 28 referred to an ownership by Mr. Jack Murphy, as of the 30th May, 1994 and further that the lot number on the notification to the Appellant company was incorrect.

Under cross-examination by Mr. Harte, Mr. Bardon was asked if he accepted that between May, 1994 and the 10th November, 1994 the lot in question was divided from 19 to 19a and 19b. On further cross-examination he confirmed that the incorrect number did not affect the right of appeal of the Appellant company and agreed that there was no question that he (the Appellant company) did not know what was involved. He further agreed that Dunkitt was a small townland and that there was no sign on the subject property. When asked if the Planning Application for the property was made under H. Denning t/a Kerry Foods, he indicated that this was not the case. On the suggestion that there was no prejudice occasioned

to the Appellants in the circumstances, he indicated that there was, in that they would have to pay rates outside the ambit of the Valuation Acts. He agreed that there was no other property owned by Kerry Foods in this area.

Mr. Kyne appeared on behalf of the Valuation Office and he also adopted his précis as his evidence in chief. He indicated that the R2 Form was received in June, 1994 and would have been dated May, 1994. He also indicated that the correct lot was listed on this form. Mr. Kyne further indicated that the valuation had been agreed at first appeal stage.

Under cross-examination by Mr. O'Caoimh, Mr. Kyne confirmed that the new R2 Form was most likely received in early June. He further confirmed to Mr. O'Caoimh that he was not the revising Valuer and therefore could not confirm whether there was a lot number 19b at revision stage. On further questioning Mr. Kyne answered that there was no other lot bearing the number 19b in May, 1994.

Mr. Harte, Solicitor for Kilkenny County Council introduced Ms. Curran who is a Staff Officer in the Rates Department of Kilkenny County Council. Ms. Curran confirmed that all such notifications were prepared on the 30th May, 1994.

In ascertaining the position regarding lot number 28a, Ms. Curran indicated that this would have been a clerical error and was incorrect but that they did make notification of the property in Dunkitt for revision. She further explained that having been listed in May, 1994 the documentation would have been dispatched in the first ten days of the following month and a copy had not been kept by Kilkenny County Council. In establishing as to how Mr. Kyne then obtained a copy of the R2 Form produced by them at the hearing, Ms. Curran explained that on the 27th May, 1996 they received a letter from Hennigan & Company and they prepared a copy of the original R2 Form and they sent it to them. This document referred to lot number 19b and when Messrs. Hennigan & Company requested the initial notice it was not available and no copy had been kept. The witness indicated that neither she nor the County Council were making any effort to circumvent the Act in this procedure.

Evidence was further given that on inspection of the property there were no signs indicating that it was owned by Kerry Foods and that locally it was regarded as "Denning". The planning application had been made in H. Denning t/a Kerry Foods, for refurbishment of the premises under planning reference P406/93. The original application which was produced showed it as an existing "agricultural shed". Ms. Curran also gave evidence that with other County Councils the lot numbers are not quoted for example Tipperary, Fingal and Wicklow.

Under cross-examination, the witness confirmed that the forms were not pre-signed but that they were stamped on being sent out by the County Council.

On the "constructed form" which was sent to the Appellant's advisors the witness again confirmed that no copy had been kept and whilst she accepted that the communication was inaccurate she indicated that it was not misleading. She further confirmed that the form dated the 30th May was posted out within 10 days to the Appellant.

Mr. O'Caoimh submitted that the only notice referred to in documentation was to lot number 28a. He further stated that the 1988 Act uses words such as "shall" and "if known". In this case the owner is known and anything else is irrelevant according to Mr. O'Caoimh. He further submitted that in order to have due compliance with the Act the word "shall" implies a provision of duty which is mandatory. The statutory interpretation by Judge Henchy in ***The State (ELM Developments Ltd) v. An Bord Planeála [1981] ILRM 108*** states that a requirement such as this is mandatory and Judge Henchy would "not excuse the departure from it".

Mr. O'Caoimh further submitted that a decision at revision stage affects the rights of members of the public. It is a statutory function of the County Council to notify occupiers of hereditaments listed for revision and the essential requirements of the legislation in this regard must be met. He submitted that there was no notification on lot number 19 as required by Section 4(a) of the Act and that such notification is mandatory.

In conclusion, Mr. Harte suggested that from a factual point of view Kerry Co-Operative received the notice, there was only one property, and one physical structure in place. He stated that the errors in relation to the lot number had not been raised for two years even though an appeal procedure was available to them and they had this length of time to seek professional guidance. He further submitted that there was no set form provided for in the legislation and that the substantive requirement related to notification. He submitted that adequate evidence of notification was given and a clerical error, while regrettable, did not prejudice the subject. He indicated that Kilkenny County Council had substantially complied with the Act.

Mr. Kyne for the Respondent indicated that the intention of *Section 3(4)(a) of the 1988 Act* is to give advance warning of a Valuer calling to inspect a premises, for identification purposes.

In his closing submission on behalf of the Appellant, Mr. O'Caoimh stated that the Act does not indicate that someone would be visiting the property and while there is no particular form described, a clear designation has to be indicated as stated in the decision of Mr. Justice Barron in the ***R. & H. Hall*** case delivered on the 16th December, 1994. Mr. O'Caoimh further submitted that while lot numbers may or may not be used, where a Local Authority chooses to use a lot number they must exercise care in this regard and if the lot number, is used incorrectly this shows failure to indicate the nature of the request to the Commissioner. He further submitted that if the information on the planning application was used it showed clear designation. It was contended that an appeal could result from any number of revisions and while the Appellant company may not be prejudiced in relation to their right to appeal, a liability to pay rates arises until the determination of the appeal and this of itself is prejudicial.

Having regard to all of the evidence adduced the Tribunal determines as follows:-

1. there was a clerical error made by Kilkenny County Council;
2. such an error in this circumstance did not prejudice the Appellant company;
3. there was sufficient compliance with the provisions of the 1988 Act; and

4. the appeal consequently fails on the grounds submitted and the rateable valuation as submitted stands.