Appeal No. VA02/3/001

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Nollaig Nominees Ltd. t/a Four Seasons **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Hotel @ Lot No. 19C Merrion Road, ED/Ward; Pembroke East E, County Borough of Dublin.

B E F O R E

John O'Donnell - Senior Counsel	**Chairperson**
Fred Devlin - FRICS. FSCS	**Deputy Chairperson**
Joseph Murray - Barrister	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 15TH DAY OF DECEMBER, 2003

By Notice of Appeal dated 9th May 2002, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €450 on the relevant property described above.

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

"1. The valuation is excessive and inequitable.

2. The valuation is bad in law."

BACKGROUND:

A preliminary issue has arisen in this Appeal. The issue in question relates to the admissibility in evidence of certain comments made by rating consultants GVA Donal O'Buachalla in a case involving the Westin Hotel in Dublin. In the course of the first appeal by the Westin Hotel against the rateable valuation fixed for that property, the Westin Hotel (through its agents, GVA Donal O'Buachalla) submitted a form providing various pieces of information about the Westin Hotel. The said form includes some seventeen paragraphs. Paragraphs 14-17 are headed "Without Prejudice". The form used is a pro-forma form.

What has now happened is that the Commissioner of Valuation wishes to utilise the comments made by Ms. O'Buachalla (on behalf of the Westin Hotel) in dealing with the appeal of the Four Seasons Hotel against the rateable valuation fixed for it. In effect Mr. Dineen, on behalf of the Commissioner of Valuation has adopted the relevant submissions made by Ms. O'Buachalla in relation to the Westin Hotel as part of the response by the Commissioner of Valuation to the appeal against the valuation by the Four Seasons Hotel. Given that the points in question upon which Mr. Dineen relies are the very points set out in the written form under the heading "Without Prejudice" the issue which requires a preliminary ruling is: Is the Commissioner of Valuation entitled to use the submissions made initially in the Westin Hotel case as part of the Commissioner of Valuation's own submissions in the Four Seasons case, where the relevant submissions have been made "Without Prejudice"?

LEGAL SUBMISSIONS:

Both parties were represented by Counsel at the hearing of this matter. The Tribunal was greatly assisted by the submissions made by Counsel at the hearing. Both sides also filed written legal submissions. In addition we were provided with case law. We were also provided with extracts from the Valuation Office/Consultant's Forum in 1992 at which

the issue of "Without Prejudice" documentation was discussed. By agreement we were also given the original submission made by Ms. O'Buachalla in the Westin Hotel case.

THE LAW:

The law in relation to "Without Prejudice" documentation is settled and there was no great dispute between the parties in relation to its meaning. Both parties relied on the decision in **Rush & Tompkins Limited –v- Greater London Council [1989] 1 A.C. 1280** and also on the Judgment of **Keane J (as he then was) in Greencore Group Plc & Ors. –v- Murphy & Ors. [1995] 3 IR 520**. We were also referred to the text **Civil Procedure in the Superior Courts (Delaney & McGrath) (Roundhall 2001).** The authors state in relation to "Without Prejudice" privilege at paragraph 8.056:

> "*In order for a claim of privilege to succeed, the party claiming it must establish that the communication in question was made;*
>
> *(i) In a bona fide attempt to settle a dispute between the parties, and*
> *(ii) With the intention that if negotiations failed it could not be disclosed without the consent of the parties."*

In the **Rush & Tompkins** case Lord Griffiths (at page 131) holds as follows:

> "*It seems to me that if those admissions made to achieve settlement of a piece of minor litigation could be held against him in a subsequent major litigation it would actively discourage settlement of the minor litigation and run counter to the whole underlying purpose of the "Without Prejudice" rule. I would therefore hold that as a general rule the "Without Prejudice" rule renders inadmissible in any subsequent litigation connected with the same subject matter proof of any admission made in a genuine attempt to reach a settlement. It of course goes without saying that admissions made to reach settlement with a different party*

within the same litigation are also inadmissible whether or not settlement was reached with that party."

Keane J (as he then was) echoes this statement in **Greencore –v- Murphy** where (at page 525) he states:

"*A number of authorities were cited in the course of argument which make it clear that offers made in the course of negotiations for settlement are not normally admissible in evidence and that this is usually ensured by marking the relevant correspondence or documents "without prejudice". (It should, of course, be borne in mind that the application of the Rule is not necessarily dependent on the use of the words "without prejudice") It is also clear that the rule is founded on public policy, the courts taking the view that parties should be encouraged as far as possible to settle their disputes without recourse to litigation and should not be discouraged by the knowledge that anything that is said in the course of negotiations may be used in the course of proceedings. The relevant law is clearly and comprehensively stated in the speech of Lord Griffiths in* ***Rush & Tompkins Limited –v- Greater London Council [1989] A.C. 1280****. This last mentioned decision also makes it clear that such correspondence is also inadmissible in any subsequent litigation connected with the same subject matter whether between the same or different parties."*

Keane J continues (at page 526):

"It may well be that documents, which prima facie are protected by the "without prejudice" rubric, may on inspection turn out not to be so protected. Thus, in the present case, there may be parts of the conversation as recorded which would properly be regarded as relating to statements as to future conduct, rather than as possible admissions as to matters in the past. Since the primary object of the rule is to ensure that a party is not embarrassed by having admissions made by him solely for the purpose of settlement negotiations subsequently used to his

detriment in litigation, it is obvious that statements which related solely to his future conduct and could not be regarded as admissions made as part of an offer of settlement would not necessarily be protected from disclosure."

THE APPELLANT'S CASE:

For the Appellant, Mr. Conway says that this case falls squarely within the limits set out in **Rush & Tompkins** and **Greencore –v- Murphy**. He contends that the communication was made in a bona fide attempt to settle the issue of valuation at first instance. He also says that the communication in question was made with the intention that should the attempts to settle be unsuccessful, it would not be disclosed without consent in any subsequent litigation connected with the same subject matter (whether between the same or different parties). So far as subject matter is concerned, he says that the subject matter of the Westin case was the quantum of the rateable valuation of a luxury hotel (being in that case the Westin Hotel). Therefore, he says, the Commissioner is seeking to use the communication in question in subsequent proceedings connected with the same subject matter (being again the quantum of rateable valuation of a luxury hotel). He also contends that there is an implied undertaking that information submitted under the "Without Prejudice" heading will not be used again and relies on **Greencore – v- Murphy** in this regard. He points to the fact that the parties have gone to considerable lengths to try to provide a "Without Prejudice" section in the form in question, in which Appellants or their agents or advocates can speak freely in relation to the case in which they are in on behalf of their client.

THE RESPONDENT'S CASE:

For the Commissioner of Valuation, Mr. Devlin makes the point that use of the phrase "Without Prejudice" does not have any magical power and therefore does not automatically protect information listed under this heading. He suggests that in any event a consideration of the actual "Without Prejudice" statements indicates that they are not necessarily to be regarded as admissions against interest.

He also submits that the subject matter of the litigation in the Westin case was the rateable valuation of the Westin Hotel. However, he says, the subject matter of the appeal here is the rateable valuation of the Four Seasons Hotel. He does not accept that there is any distinction between the subject matter and the subject premises. In essence the case is about the liability of the particular occupier of a particular property to a particular rateable valuation. He accepts that there is an implied undertaking in relation to the use of documentation furnished which is "Without Prejudice" but does not accept that the same implied undertaking relates to the use of information.

DECISION:

The Tribunal has carefully considered the submissions, legal authorities and documentation presented to it. The Tribunal concludes as follows:

(i) The statements made by Ms. O'Buachalla under the "Without Prejudice" heading in the form in the Westin Hotel case were made in a bona fide attempt to settle a dispute. At first appeal there is the somewhat unusual process whereby the Appellant submits the form in question (which includes without prejudice information) to the Commissioner of Valuation, which body will eventually adjudicate on whether or not the Appeal should be allowed. Nevertheless, we are satisfied that the submissions in question are invited with a view to (inter alia) trying to promote settlement of the issue of rateable valuation which is obviously the issue in dispute between the parties.

(ii) It seems to us also that there is the clear intention on the part of the entity supplying the information (the Westin Hotel – in this case through its agent, GVA Donal O'Buachalla) that if the settlement negotiation failed the information furnished on a without prejudice basis will not be utilised in any subsequent litigation connected with the same subject matter. So, for example, the "Without Prejudice" information would not be used against the Westin Hotel on appeal to

the Valuation Tribunal, or in a revision of valuation, or indeed in a subsequent valuation should all or any of these arise.

(iii) Having considered the form in question and the contents of the "Without Prejudice" submissions, it is clear to us that these are not statements of future intention. While this does not automatically confer "Without Prejudice" privilege on them it does seem that the submissions in question are in the nature of admissions which, while not necessarily against interest at the time, could subsequently be regarded as such if circumstances were to change. It thus seems to us that the subject matter of the submissions in question is the kind of subject matter that normally is accorded "Without Prejudice" privilege.

(iv) The Tribunal is of the view that the rateable valuation of the Four Seasons Hotel is not the same subject matter as the rateable valuation of the Westin Hotel. While Mr. Conway argues that some meaning must be given to the phrase "*connected with* the same subject matter" (emphasis added) we do not believe that the subject matter is the evaluation of a type or category of hotel. In our view the valuation of the type or category of hotel is a process. The individual hotel is the subject which was considered in the individual application of that process. It therefore seems to us that the phrase "subject matter" must refer to the individual hotel rather than the nature or type of process being carried out. The Tribunal therefore concludes that the rateable valuation of the Westin Hotel is not connected with the rateable valuation of the Four Seasons Hotel. It does appear that the rights and liabilities under consideration in each case are different; in the first case it is the rights and liabilities of the Westin Hotel, but in the instant case it is the rights and liabilities of the Four Seasons Hotel.

(v) In this regard it may be helpful also to look at certain of the provisions of the Valuation Act 2001. Section 3 indicates that "relevant property" is to be construed in accordance with Schedule 3 of the Act. That schedule in turn sets out the various types of properties which are rateable. It is notable also that the appeal

against the Commissioner of Valuation's valuation of a property must in accordance with Section 31(a) specify "(i) the grounds on which the appellant considers that the value of *the property, the subject of the appeal* (in this section referred to as "the property concerned") being the value as determined under Section 19 or 28, is incorrect, and (ii) by reference to values stated in the valuation list in which the property concerned appears of other comparable properties, what the appellant considers ought to have been determined as the property's value" (emphasis added). It seems to us that the "subject matter" here is the property the subject of the appeal rather than the process of valuation, or even the process of appealing against valuation.

(vi) It therefore appears to us that the information in question is not being used in subsequent litigation connected with the same subject matter. There does not therefore appear to be any breach of the "Without Prejudice" privilege.

(vii) The Tribunal also notes the observations of the House of Lords and Keane J in relation to the primary purpose of the "Without Prejudice" privilege: to ensure that a party is not embarrassed by having admissions made by him solely for the purpose of settlement negotiations subsequently used to his detriment in litigation. In the Westin Hotel case the submissions made were submissions made by GVA Donal O'Buachalla who was acting at all material times as agent for the Westin Hotel. It is hard to see how the use of those admissions in a completely different case involving a completely different subject matter (being the Four Seasons Hotel) could possibly embarrass the Westin Hotel.

CONCLUSION:

The Tribunal therefore concludes that the use of the information contained in the Westin Hotel written form under the heading “Without Prejudice” in a subsequent dispute over the rateable valuation of the Four Seasons Hotel is not a breach of the “Without Prejudice” privilege and is admissible in the appeal concerning the Four Seasons Hotel.