Appeal No. VA04/3/040

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Centre Operators Ltd. **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Sports Centre at Lot No. 15Aa/1, Balally, Dundrum Sandyford, County Dublin.

B E F O R E

John Kerr - BBS. ASCS. ARICS. FIAVI	**Deputy Chairperson**
Joseph Murray - B.L.	**Member**
Patrick Riney - FSCS FRICS FIAVI	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 31ST DAY OF JANUARY, 2005

By Notice of Appeal dated the 10th day of August, 2004, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €3,150.00 on the above described relevant property.

The Grounds of Appeal as set out in the Notice of Appeal are:
"6(a)(i). (1.) The R.V. is incorrect because it includes common areas which are also used by other tenants in the development.
(2.) The R.V. on the Fitness Centre per se is excessive by comparison with comparable Fitness Centres.
6(b)(i). The common areas referred to at 6(a)(i)(1) above are not exclusively in the occupation of the appellant."

The Appeal proceeded by way an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay, Dublin, on the 29th day of November, 2004 and resumed on the 15th day of December, 2004. At the hearings, the appellant was represented by Mr. Owen Hickey, BL, instructed by Mr. John Burke, Solicitor, Ivor Fitzpatrick and Company Solicitors and Mr. Pat Gannon, Valuer, NAI Mason Owen & Lyons, Auctioneers & Valuers. Evidence was given by Mr. Christian Weaver, Managing Director, Christian Weaver Architects, who had re-measured the subject property. Mr. Brendan Conway, BL, instructed by the Chief State Solicitor appeared on behalf of the respondent. Mr. Tom Sweeney, Chief State Solicitor's Office and Mr. Damian Curran, MRICS, ASCS, BSc (Surv), Grade 1 Valuer in the Valuation Office were also present. Both parties having taken the oath adopted their respective précis, which had previously been received by the Tribunal, as their evidence-in-chief. From the evidence so tendered, the following emerged as being the facts relevant and material to the Appeal.

The Property Concerned

The property concerned is a modern two storey detached Sports Centre operating under the name "Total Fitness". The ground floor of the subject property contains a large gymnasium, swimming pools, a sauna, an aerobics room, changing rooms, a juice bar, a kitchen, squash courts, as well as reception, sales and administration areas. The first floor houses a running track, a spinning room, an aerobics room, a ladies' gym, a yoga room and a number of smaller plant rooms. There is extensive car parking available. The property is located on an elevated site of circa 7 acres off Blackglen Road, Sandyford, Co. Dublin.

At Issue

1. The Main issue in dispute was the inclusion by the Commissioner of Valuation of the designated common areas within the premises. The appellant's contention was that:
   "The main entrance to the Fitness Centre is through a Foyer and central Mall leading to the main stairs and lift. The Fitness Centre, the Retail Outlets and the Medical Centre are situated directly on the Mall and the Crèche, the Human Performance Laboratory and the Staff Apartment are situated along corridors leading directly off the Mall. These corridors also serve the shared toilets, the fire escapes and a shared deliveries passage."

2. The appellant also submitted that they do not enjoy exclusive occupation of these common areas, they are not in rateable occupation of them, and accordingly those specific areas should not be rated. The total floor area of these shared or common areas is 427 sq. metres.

Valuation History

3. The appellant appealed to the Commissioner and on appeal the Commissioner excluded most of the unfinished areas of the so-named common areas. The Commissioner reduced the RV to €3,150 and issued a final Certificate in June, 2004. However, this RV included a rate levied on the subject common areas. The appellant appealed his decision to the Valuation Tribunal.

Appellant's Evidence

4. The area measurements confirmed by the Architect indicated a difference of circa 11 sq. metres between his total and the figure used by the Valuation Office, and it was claimed that both parties understood and agreed same during the course of all their discussions.

5. The original agreed measurement for the disputed common area was circa 328.98 sq. metres.

6. Mr. Gannon stated that in all his years of experience, the common areas were never taken into account in assessing rates. He contended that such areas were provided for the benefit of the customers of the shops, crèche and so on in the premises and it was obvious the area marked as the "Blue Area" in their précis of evidence was indeed intended to be considered and used as common areas. His primary comparison property introduced in his précis of evidence was the Westwood Club, Leopardstown, a premises located in the same Rating Authority area as the subject and situated within the Leopardstown Racecourse Complex.

7. Under cross-examination by Mr. Conway, Mr. Gannon stated that the specific area measurements submitted by the Valuation Office had never been formally agreed with the appellant. He also stated that the common areas were never actually discussed, because it was Mr. Curran's opinion that he was required to value the entire premises.

8. Under cross-examination Mr. Curran said that the Revision took place in November 2003 and the inspection in September/October 2003**.** The location was noted by him as being very close to Westwood and broadly similar in function. He stated that access to the subject property had improved, which was fundamental to the occupiers' locating there at the start.

9. Mr. Curran acknowledged that the most suitable comparison was Westwood. However, he did consider it inferior to the subject for a number of reasons including:
   (a) Not visible from the road,
   (b) A 5 % concession on the assessment of rates was granted by the Valuation Office to reflect the semi-detached nature of the building attached to the Racecourse pavilion.
   (c) The lack of clear definition of the boundaries of the site area surrounding and serving the Westwood facility, again shared with the Racecourse operators.

   Mr. Curran confirmed that he was also the Valuation Office Appeal Valuer on Westwood in 2001.

10. Mr. Curran stated that at the time of the Revision and Appeal, Centre Operators were not sure as to whether they would occupy the entire premises themselves or let them on the open market. He also mentioned Dublin Airport as a suitable comparison which has substantial malls and shops operated by Aer Rianta, and where all of the public corridors and common areas had been rated.

Resumed Hearing held at Tribunal Offices on 15/12/04

11. Mr Hickey, on behalf of the appellant stated that:
   (a) The floor area difference of circa 11 sq. metres, as certified by the Architect, was fundamental to the valuation of NAV;
   (b) The Revision and Appeal Valuer were apparently one and the same person in this case.
   (c) **Harper Stores Limited v Commissioner of Valuation [1968] IR 166** serves as the appellant's primary evidence.

(d) The Dublin Airport/Aer Rianta example cited by the respondent was a very inappropriate comparison to introduce as it is a property located north of Dublin in another Rating Authority area, and is fundamentally different to the subject property being a transportation hub where thousands of people are led through each day either boarding or disembarking from domestic or international flights.

(e) He considered the cases noted below **Iarnrod Eireann v Commissioner of Valuation**, (**unreported judgment, Barron J., 27 November [1992])** and **Francis Carroll v Mayo County Council [1967] IR**, also cited by the respondent as not relevant.

(f) He considered that trading indicators are often referred to in assisting with the exercise of rating valuations.

12. Mr. Conway, speaking on behalf of the respondent stated that:

(a) Mr Curran, on behalf of the Commissioner, valued on the basis of material facts.

(b) This Appeal may only deal with the areas taken into account at First Appeal stage.

(c) Mr. Gormley in the Valuation Office asked Mr. Curran to give his opinion of the facts, which resulted in a decision taken by Mr. Gormley, acting in the role of the Appeal Valuer, which was affirmed by the Commissioner.

(d) Mr. Conway stated that documents given to the Commissioner must be allowed to be used as reference materials by the Valuation Office and cannot be considered and received on a " Without Prejudice" basis, particularly as in this case it was relied on by the parties from the outset. Reference was made to the well-known **John Pettitt & Son Limited v Commissioner of Valuation VA95/5/015** case which concluded that only in an extraordinary case should fresh evidence be allowed to be submitted, and Mr. Conway contended that this was not such a case.

(e) Mr. Conway also stated that it was crucial that Centre Operators were not sure as to whether they would occupy the units entirely themselves or let them.

(f) Mr. Conway also referred to **Francis Carroll v Mayo County Council** and the High Court judgment of Mr. Justice Barron in **Iarnrod Eireann v Commissioner of Valuation.**

13. Mr. Hickey then referred to:

(a) The Letting Brochures that were available and which he contended clearly indicated that the units were to be let independently of Centre Operators' primary business.

(b) The Valuation Date was 3rd March, 2004. However, Mr. Curran's evidence refers to November, 2003.

14. Mr. Conway stated that all Mr. Curran's evidence related to November, 2003.

Findings & Conclusions of the Tribunal

General Comment

With regard to the area in dispute in this property, the Tribunal has considered it for convenience sake as the common area as indicated in colour blue on the map provided. The appellant stated that he did not have exclusive occupation of the common area at the Date of Valuation. The respondent on the other hand stated that he did not accept the concept of a common area and the appellant did have exclusive occupation of the area as there was no other tenant in the complex at the time and/or no lease had been signed with third parties to occupy same. The Date of Valuation was established as 3rd March, 2004.

Common Area

If the appellant had exclusive occupation of the entrance area and could prevent anybody else from using it in the same way, the area concerned certainly would not be classified as a common area. Moreover, if there were no other tenants in occupation at the material time, the area could be regarded as exclusive. To establish what is the legal position the Tribunal looked to:

- The Valuation Act, 2001 Section 48(3) which states that the NAV means "*the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year….*" In other words, the Act requires the reader to consider a hypothetical tenant and what he/she would pay one year with another for the property in its actual state.

- The main authority to guide the Tribunal in this case is **Harper Stores vs. The Commissioner of Valuation.**

Actual State

The facts of the **Harpers Stores** case are different from those of the subject property in that the **Harpers Stores** premises was an old building which underwent reconstruction, whereas the subject premises is a new building which was partly occupied and incomplete at the Date of Valuation. However, the same legal principles and concepts still apply under the Valuation Act, 2001. Judge Conroy of the Circuit Court stated a case to the High Court as to whether the respondent in that case was entitled to determine the "actual state" of the premises concerned within the meaning of Section 11 of the Valuation Act (Ireland) 1852 as of a date subsequent to 1st March 1960, the latter date being the latest available to the Commissioner to make the Revised Valuation. The appellant submitted that the Commissioner was bound by the 1st March date and could not consider "actual state" as applicable after that date when reconstruction was completed. The High Court Judge Henchy did not accept this. He referred to **Armstrong v Commissioner of Valuation [1905] (2) 1R 489** with regard to "actual state" as follows:

"'*The words "actual state" were introduced to ensure that the hereditament or building was valued such as it was,* rebus sic stantibus*, and to prevent speculation as to mere contingencies, speculations as to what the value of a house might be under conditions different from those subsisting.*' *If it is a house in a slum area, it may not be valued as if it were standing in a fashionable road…"*. He also said that *"the words "actual state" connote all the existing factors that go to make up the premises as they are currently occupied and used or "all that would affect the rent that would be paid by a hypothetical tenant." This includes all the advantages and disadvantages, legal and otherwise, attaching to the premises which would affect the mind of the hypothetical tenant from year to year in deciding what rent he would pay."*

The High Court Judge went on to say….

"He (the Commissioner of Valuation) must, of course, make the valuation on the premises in their "actual state", but, since "actual state" connotes the premises as it stands with all its

potentialities and disabilities, he may, in order to achieve a correct assessment, have to look at past, present and future. …the Commissioner was entitled to value it as a shop and to consider any change in the letting value to the hypothetical tenant after the 1st March. It is a matter of intention and of the degree, or quality, of use."

Accordingly, applying the same principles of law to the subject property:

- Actual state While the three units to the right of the common area may not have been occupied on Valuation Date, being 3rd March 2004, it is reasonable to conclude that they had the potentiality to be occupied. Since the words "actual state" connote the premises as it stands with "potentialities" after the said date, the Tribunal concludes that the entrance area to the Sports Centre should have been treated as a common area and accordingly, not be rated. A common area cannot be considered as exclusive in terms of occupation.

- The Tribunal was informed by the respondent that the occupier of the Sports Centre did not express any intention to occupy or lease the vacant units at the outset of First Appeal, and there was the possibility that the Centre Operators may themselves have occupied the units. However, regard must always be given to the position of the hypothetical tenant and with reference to the circumstances outlined above, it appears very unlikely that the hypothetical tenant would be willing to pay rates on the common area.

Area Measurements

Differences between the parties were highlighted at the Hearing regarding an area of 11 sq. metres and also the production of new evidence before the Tribunal, which had not been introduced at First Appeal stage. Only in exceptional circumstances, where justice demands it, can new evidence be introduced. The authority on this matter is **John Pettitt & Son Ltd.**. In that case the appellant submitted that the Revision should be declared invalid because of the inadequacy of the mapping system. The respondent asserted that this issue could not be raised before the Tribunal as it was not raised at First Appeal stage. The Valuation Tribunal found in

favour of the appellant as it was such important evidence and the interests of justice demanded that it be introduced.

However, in this case the Valuation Tribunal considered the difference of 11 sq. metres out of a total of circa 8,600 sq. metres on the overall complex was not a matter of exceptional circumstances where justice demands the introduction of new evidence. It does not affect the validity of the valuation, whatever about the quantum.

Aer Rianta, Dublin Airport – Comparison Property

The respondent compared the common area of the subject property with that of the concourse area of Aer Rianta (which has recently been restructured and renamed Dublin Airport Authority plc., under the State Airport Act, 2004). The two properties are not comparable. The Aer Rianta terminal building at Dublin Airport was purpose-built, with a concourse area, designed with a particular function and use in mind. The objective of Aer Rianta at the airport concourse is to facilitate the arrival and departure of millions of passengers per year for the airline industry. That is the business of Aer Rianta. The concourse area at Dublin Airport is part of its operator's *modus operandi*, and not something ancillary or incidental to its operations. The common area of the subject property on the other hand appears to be designed to function as a means of access to the Sports Centre or other units within the building, and is only incidental to the occupier's use, namely providing sport/ health facilities and/or otherwise

Determination of Tribunal

(a) The relevant Date of Valuation was in fact the 3rd March, 2004, and the date of inspection was November, 2003.

(b) The Valuation Tribunal is of the opinion that documents given into the Commissioner must be available for use and reference by the Valuation Office and considered as material evidence, particularly when, in this case, it had apparently been relied on by both parties from the outset. Only in extraordinary circumstances should "Fresh Evidence" be allowed to be submitted e.g. **John Pettitt & Son Limited.**. And such is not the circumstance in this

case.

(c) The Valuation Tribunal is of the opinion that the respondent's reference to Dublin Airport / Aer Rianta, as a suitable comparison is very surprising, particularly because of its function, location and distance from the subject property.

(d) The Valuation Tribunal accepts the arguments made by the appellant in regard to the common areas, and relies heavily on the judgment of **Harper Stores Ltd. v Commissioner of Valuation.**

(e) The Tribunal considers that the rate per sq. metre of €59 determined by the Valuation Office on the main complex for the purpose then identified, which at the time included the common areas, and the rate per sq. metre of €21.25 on the Plant Rooms were fair and reasonable rates per sq. metre.

(f) In view of the foregoing, the Valuation Tribunal hereby calculates the Valuation on the subject relevant property as follows:

(A) Main Complex (Rateable)	8,204.63 sq. metres
Less Common Areas	328.98 sq. metres
	=7,875.65sq. metres@ €59 per sq. metre
	= NAV €464,663.35
(B) Plant Rooms 746 sq. metres @ €21.25 per sq. metre	= NAV €15,852.50
Total NAV	**= €480,515.85**
RV@ 0. 63%	= €3,027.24
	Say RV €3,027

And the Tribunal so determines.