

Appeal No. VA06/1/017

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

Chino Catering Ltd. T/A Bennigans

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Licensed Restaurant at Lot No. Unit F10, Ballinure Road, Mahon B, Mahon, County
Borough of Cork

Quantum - location, comparisons

B E F O R E

Michael P.M. Connellan - Solicitor

Deputy Chairperson

Brian Larkin - Barrister

Member

Maurice Ahern - Valuer

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 20TH DAY OF JULY, 2006

By Notice of Appeal dated the 10th day of March, 2006 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €710.00 on the above described relevant property.

The Grounds of Appeal as set out in the Notice of Appeal are:

"On the basis that the RV is excessive inequitable and bad in law. The assessment was not fixed in accordance with the terms of the 2001 Valuation Act. No comparisons were cited by the Revision Officer and the resultant RV was not arrived at by reference to the value of comparable properties or the established tone of the list. If the property was not assessed in accordance with the Act the RV should be struck out."

This appeal proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 24th May, 2006. The appellant was represented by Mr. Eamonn Halpin, B.Sc. (Surveying), A.S.C.S., M.R.I.C.S., M.I.A.V.I. The respondent was represented by Mr. Frank Twomey, a Valuer, Grade 1 in the Valuation Office and by Mr. James Devlin, B.L., instructed by Mr. Tom Sweeney of the Chief State Solicitors Office.

The Issues

Whether or not the property was assessed in accordance with the terms of the Valuation Act, 2001.

In the alternative – Quantum.

The Property

The property comprises a large new restaurant on the lower ground floor of the new Mahon Point Shopping Centre located in the suburbs of Cork City adjacent to the City's South Link Road. The unit is situated off the inner side mall at the eastern end of the development adjacent to Debenhams entrance and is fitted out to good modern standards with ancillary kitchen, store and staff facilities to the rear. The agreed areas of the property are as follows:

Lower Ground Floor

Restaurant	428 sq. metres
Kitchen Area	268 sq. metres
Total	696 sq. metres

Valuation History

The property was first valued in May, 2005 as a new rating unit. A proposed Valuation Certificate was issued on the 16th June, 2005, proposing RV €335.00. No representations were received and a Valuation Certificate was issued on 18th July, 2005. Following an appeal to the Commissioner the RV of €335.00 was reduced to €710.00. It is against that decision of the Commissioner and the validity of the revision that this appeal to the Tribunal lies.

Tenure

The property is held under a 25 year FRI lease commencing the 1st February, 2005 at an initial rent of €200,000 per annum with 5 yearly reviews.

Licence

The premises is covered by a Restaurant Certificate under the Intoxicating Liquor Act, 1927 and is a licensed restaurant.

Appellant's Case

PRELIMINARY ISSUE

Mr. Halpin having taken the oath adopted his précis as his evidence-in-chief. At the outset Mr. Halpin purported to deal with the preliminary legal issue and contended that as the property had not been assessed in accordance with S. 49(1) of the Valuation Act, 2001 the said property should be excluded from the Valuation List and the purported rateable valuation struck out. Mr. Halpin referred to the Appellant's Notice of Appeal which stated "*no comparisons were cited by the Revision Officer and the resultant RV was not arrived at by reference to the value of comparable properties or the established tone of the list. If the property was not assessed in accordance with the Act, the RV should be struck out.*"

In support of his argument Mr. Halpin relied on the Valuation Tribunal decision in **VA04/1/024 - Gerri Cobbe & Mary McGibney (the Beacon Court case)** in which the Tribunal considered the interpretation of S. 49(1) as follows:

"In the absence of any definition in the Act as to what is comparable the word must be interpreted in its normal sense and mean equivalence, likeness or sameness. That being the case, comparable must be interpreted as being similar in use, location and nature of construction or any other factor which will have a bearing on value. The fact that the property by its very nature is not homogenous requires the valuer to use all his skills of analysis to arrive at what he or she considers to be the appropriate level of assessment in each individual case."

Mr. Halpin also relied on the following earlier precedents:

- The decision of the Tribunal in **VA04/1/054 – DID Electrical** and **VA04/1/055 – Banba Toymaster** to exclude two valuations from the list due to reliance upon comparisons from outside the rating area.

- **VA05/2/012 – Lidl Ireland GmbH** decision of the Tribunal where the Tribunal found that reliance by the Commissioner upon one comparison was not in accordance with S. 49(1) of the Act and struck out the assessment.

Mr. Halpin acknowledged, however, that the **Lidl** decision was under appeal to the High Court.

The thrust of Mr. Halpin's argument was that in the instant case at first appeal stage the revision was not carried out properly or validly in the absence of specific comparisons. He referred to correspondence between the Appeal Officer, Mr. McMorrow, and the Revision Officer, Mr. Twomey, and expressed concern with the comments of the Appeal Officer.

In particular Mr. Halpin was critical of the comments made by the Appeal Officer in his letter dated the 3rd February, 2006 and the Revision Officer's reply thereto. Mr. Halpin considered that the sentiment expressed therein and the emphasis placed on the tone of the list rather than passing rent was prejudicial to his client.

When put to Mr. Halpin by the Chairperson that there had been downward revision of the RV from €335.00 to €710.00 at first appeal stage, Mr. Halpin acknowledged this but indicated that the revision had not gone far enough. Mr. Halpin in fact persisted in contending that passing rent levels were a significant factor between agents and the Valuation Office and had not been adequately factored into the RV of the subject property. On that basis combined with the fact that the resultant RV was not arrived at by reference to the value of comparable properties, Mr. Halpin insisted that the RV should be struck out.

In any event Mr. Halpin argued that an anomaly existed in the context of S. 49 (1). He was commenting on the Respondent's comparisons in Wilton, Blackpool and Mahon Point and in particular McDonalds Restaurant in Mahon Point Shopping Centre – the only common comparison in his view. Mr. Halpin contended, despite Mr. Twomey's evidence, that passing rents were a key factor in the calculation of rateable valuations for these properties. On that premise, Mr. Halpin pointed out that an anomaly arose in the circumstances whereby the rents commanded by McDonalds and the subject were €202,300 and €200,000 respectively while the RV of McDonalds was €340 and the RV of the subject was €710!

At this point the Chairperson indicated to Mr. Halpin that it was open to the Appellant to have sought relief in the High Court by way of judicial review but he chose not to do so. The Chairperson (relying on **VA05/4/013 – Greaney Concrete Products Ltd.**, 9th May, 2006) declined to accede to the Appellant's preliminary application that the property be excluded from the Valuation List on the basis that proceedings to which the Tribunal were not privy were not within its remit. The Chairperson directed that Mr. Halpin continue by giving evidence on the quantum issue.

Quantum

Mr. Halpin contended for a rateable valuation of €340/€360 calculated as follows:

Restaurant 428.2 sq. metres* @ €95.67 per sq. metre	= €40,966.00
Ancillary 268.4 sq. metres* @ €7.84 per sq. metre	= €2,840.00
Total NAV	€3,806.00
@ 0.63% = RV €338.98	Say RV €340.00

Or

696.6 sq. metres overall @ €82.00 per sq. metre = NAV €57,121.00
 @ 0.63% = RV €360.00

Or

Passing rent €200,000 adjusted to NAV @ 27% of passing rent = NAV €54,000
 @ 0.63% = RV €340.00

** amended to 696 sq. metres as per Valuation Office areas.*

In support of his opinion of Net Annual Value Mr. Halpin introduced four comparisons all located within the Mahon Point Shopping Centre, details of which are set out in Appendix 1 to this judgment.

Mr. Halpin referred to his précis, photos and maps and described the Mahon Point development as a fine Shopping Centre on the fringe of residential areas on the outskirts of Cork City. By reference to the Respondent's aerial colour map he pinpointed its precise location and also that of Wilton and Blackpool Shopping Centres. Mr. Halpin drew attention

to the fact that Wilton Shopping Centre benefited substantially from its nearness to the South Ring Road, Cork.

Mr. Halpin then embarked on a verbal “walkaround” of the Mahon Point Shopping Centre referring in the process to the multi-storey car park and location of the main entrance adjacent thereto. Mr. Halpin referred to the positioning of the prime units on the retail mall and contrasted same with the peripheral location of the subject at the end of the mall. Mr. Halpin emphasised that the subject premises were almost totally obscured with no other retail activity beyond it and little footfall. The attractive rental at €200,000 per annum, Mr. Halpin added, reflected these factors.

Mr. Halpin then proceeded to refer to his comparisons. He stated that the best evidence with regard to the rateable valuation of the subject licensed restaurant was contained within Mahon Point Shopping Centre itself, while he did not accept the relativities in value there by reference to adjoining units. Mr. Halpin contended that an established pattern of value existed there based on rent. Mr. Halpin reviewed his four comparisons as outlined in his précis viz McDonalds, Barratt Shoes, NEXT and Champion Sports but focused in particular on McDonalds Restaurant which in his view was the only common comparator. McDonalds, he stated, was located on the upper ground floor of the Shopping Centre, unlike the subject property which was situated on the lower ground floor, and enjoyed a particular benefit from a large common seating area on the adjacent food court. However, it was common in function to the subject property. The fact that it was significantly smaller than the subject property at 140 sq. metres for the restaurant, kitchen and prep areas and yet commanded a similar rent to the subject at €202,300 per annum, reflected its exposure to the unlimited seating area more than anything else. Crucially, Mr. Halpin observed that the NAV as a percentage of passing rent was 26.7%.

Mr. Halpin then touched briefly on the NEXT unit in the Shopping Centre. This unit was arguably the best located unit within the centre, he added, adjacent to the Tesco entrance which carried the greatest footfall but yet the rate level applied to the ground floor of this unit at €150.29 per sq. metre was less than that applied to the subject of €163.95 per sq. metre.

Mr. Halpin concluded by summarizing the NAV's as a percentage of passing rents in respect of his four comparisons within Mahon Point Shopping Centre as follows:

Unit	NAV as % of Passing Rent
McDonalds Restaurant	26.7
Barratt Shoes	28.0
NEXT	24.6
Champion Sports	30.0

Mr. Halpin was cross examined by Mr. Devlin on aspects of his evidence to the Tribunal. Mr. Devlin put it to him that S. 49 provided that if the value of a relevant property fell to be determined for the purposes of S. 28 (4) of the Act, that determination should be made by reference to the values as appearing in the list relating to the same rating authority area as that property was situate in, of other properties comparable to that property. Mr. Devlin added that for the purposes of S. 49(1) the test was “*values of comparable properties*” not “rent”. Mr. Halpin in reply relied on the **Beacon Court** case in which the Valuation Tribunal in its judgment on the 1st September, 2004 considered the meaning of the word “*comparable*” in S. 49 as follows : “...*comparable must be interpreted as being similar in use, location and nature of construction or any other factor which will have a bearing on value*”. Crucially Mr. Halpin argued “any other factor” embraced rental values from which the tone of the list derived and not simply “value” per se.

Mr. Halpin was also questioned by Mr. Devlin in relation to the 25% to 30% NAVs/passing rent ratio which the appellant heavily relied on but disputed Mr. Devlin’s assertion that this was based on one property only. Mr. Halpin, on the contrary, referring to his letter of 30th January, 2006 to the Appeal Officer, stated that the ratio was supported by a further seven properties advised to him by estate agents but not tested on appeal. The Chairperson, however, refused to admit the agent’s evidence since it was based on hearsay and was unsupported by formal documentation.

Mr. Devlin then proceeded to comment on the appellant’s comparisons. In particular he challenged Mr. Halpin on the validity of comparison No. 4 Champion Sports unit in the Mahon Point Shopping Centre against the background of his reliance on the ratio NAVs/passing rents 25% to 30%. Mr. Devlin suggested to Mr. Halpin that Mr. Twomey would say that the rental of the said property was of the order of €200,000 and that a

devaluation of that produced a ratio of 38% and not 25% to 30%. Thus, Mr. Devlin added by citing this example Mr. Halpin defeated the whole purpose of his argument.

Arising out of further questions from Mr. Devlin on the location of the subject premises Mr. Halpin stated that the development concept for the subject premises was highly dependent on passing trade, but that the restaurant did not benefit from such as there was no ongoing after-hours trade. The public, he said, would only frequent the premises when the Shopping Centre was open. Significantly Mr. Halpin advised the Tribunal that the survival of the subject property was down to an excellent marketing arrangement linking restaurant bookings with tickets for the adjacent cinema.

Respondent's Case

Mr. Twomey having taken the oath adopted his written précis and valuation as being his evidence-in-chief. In his evidence Mr. Twomey contended for an RV of €710 calculated as set out below:

Restaurant 428 sq. metres	@ €163.95 per sq. metre	= €70,210.00
Kitchen Area 268 sq. metres	@ €163.95 per sq. metre	= <u>€44,004.00</u>
	Total NAV	= €114,214.00
@ 0.63% = RV		Say €710.00

In support of his opinion of net annual value Mr. Twomey produced eight comparisons, details of which are set out in Appendix 2 to this judgment. Comparisons 1-3 were located in Wilton Shopping Centre, comparisons 4 and 5 were located in Blackpool Shopping Centre while comparisons 6 – 8 were located in Mahon Point Shopping Centre.

In evidence Mr. Twomey said that he valued the entire Mahon Point Shopping Centre from scratch, using the intelligence he had gathered in valuing the Blackpool and Wilton Shopping Centres in Cork City. Mr. Twomey informed the Tribunal that he attempted to slot Mahon Point Shopping Centre into the tone developed for the above mentioned Cork City Shopping Centres. He emphasised that in no case did he assess NAV on the basis of passing rents. Mr. Twomey furthermore stated that he disputed Mr. Halpin's suggestion that an overall NAV/passing rent ratio of 25% to 30% obtained for Cork City Shopping Centre units.

Reverting to the subject premises, Mr. Twomey stated that he valued the restaurant and kitchen areas as an entity at the same level viz €163.95 per sq. metre. Mr. Twomey then reviewed his comparisons, referring in the process to handwritten notes included in Mr. Halpin's précis. Mr. Twomey, commencing with Wilton Shopping Centre, indicated to the Tribunal that while the Hamburger Inn and Gallery Restaurant valuations were initially rent based (1989 rent levels adjusted), the said valuations were subsequently affirmed by the Valuation Tribunal. These decisions of the Tribunal, he said, set the tone for Wilton Shopping Centre and subsequent units were valued by reference to this tone and not to passing rents.

Mr. Twomey then compared his two examples in Blackpool Shopping Centre i.e. Charlies Restaurant and McDonalds Restaurant which were valued at €184.44 and €164.21 per sq. metre respectively to the subject premises which was valued at €163.95 per sq. metre despite the fact that in his view Mahon Point Shopping Centre was in a superior location to Blackpool Shopping Centre.

Moving on to his comparisons within Mahon Point Shopping Centre itself, Mr. Twomey informed the Tribunal that while he looked at passing rents, his valuations were based on the tone of the list set by Wilton and Blackpool Shopping Centres. Asked by Mr. Halpin if he was aware that the ratio NAVs to passing rent were in the range 25% to 30% in Mahon Point Shopping Centre, Mr. Twomey replied that he accepted that proposition only if extreme ratios were omitted. If the extreme ratios were factored in Mr. Twomey advised the Tribunal that the ratios range would have been of the order of 19% to 75%.

Mr. Twomey concluded his evidence by emphasising that with regard to RVs in Mahon Point Shopping Centre in general and to the subject premises in particular, he adhered to the tone of the list even if to some extent rents were an arguable factor. It was not true, Mr. Twomey said, that he adopted a ratio of NAVs/passing rents of 25% to 30% and applied it across the board as Mr. Halpin suggested. The subject premises was valued by reference to the tone of the list at the lowest end of his comparative evidence.

Mr. Twomey was cross-examined by Mr. Halpin and by reference to the respondent's comparisons he was persistently pressed on the impact passing rents had in arriving at RVs. Mr. Twomey rejected any such suggestions and re-iterated that the RVs were based on the

tone of the list established by Wilton and Blackpool Shopping Centres. Any relevance to rents, Mr. Twomey added, was incidental. Asked by Mr. Halpin which of his comparisons was the most relevant to the subject, Mr. Twomey replied McDonalds Restaurant in Blackpool which was valued at €164.21 per sq. metre.

Findings

The Tribunal having carefully considered all the evidence and arguments adduced by the parties makes the following findings:

1. Mr. Twomey's comparisons were based on the tone of the list and not passing rents.
2. The tone of the list was established by Blackpool and Wilton Shopping Centres.
3. Mahon Point Shopping Centre was not on the list when the subject premises was being valued and thus comparisons within the centre were not available to Mr. Twomey.
4. The subject premises, despite being adjacent to Debenhams, is poorly located at the eastern end of the Mahon Point Shopping Centre with no possibility of passing trade and little general footfall.
5. The vast majority entering Mahon Point Shopping Centre do so through the Tesco entrance as opposed to the northern entrance close to the subject premises.
6. The common comparator, McDonalds Restaurant in Mahon Point Shopping Centre which is rated at a level of €341.56 per sq. metre (Restaurant) is located on the upper ground floor level and benefits from the food court seating. The rate per sq. metre reflects the enhancement value of this common seating area.
7. The survival of the subject restaurant premises is down to an astute marketing arrangement with the adjacent cinema combining a restaurant booking and cinema ticket package.
8. The passing rent of the subject premises, advised at €290.00 per sq. metre approx also reflects the fact that the unit is not fronting on to the main retail mall but is poorly sited in a cul-de-sac which accesses crèche and toilets serving the shopping centre.

Determination

Having regard to the foregoing the Tribunal determines the RV of the subject property to be €26.00 calculated as follows:

696 sq. metres	@ €120.00 per sq. metre	= NAV	€3,520.00
	@ 0.63%	=	€26.18
	Say		€26.00

And the Tribunal so determines.