Appeal No. VA08/5/187

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Kilsaran Concrete **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Property No. 451450, Quarry at Ballinascorney Upper, Brittas, County Dublin.

B E F O R E

Fred Devlin - FSCS.FRICS	**Deputy Chairperson**
Brian Larkin - Barrister	**Member**
Tony Taaffe - Solicitor	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL ISSUED ON THE 2ND DAY OF SEPTEMBER, 2009

By Notice of Appeal dated the 22nd day of August, 2008 the appellant appealed against the determination of the Commissioner of Valuation in fixing a valuation of €436,000 on the above described relevant property.

The grounds of appeal are set out in the Notice of Appeal, a copy of which is attached at Appendix 1 to this judgment.

1. With the mutual consent of the parties this appeal was heard contemporaneously with appeal VA08/5/188 – (Kilsaran Concrete) at the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 11th day of December, 2008, the 15th day of January, the 12th day of February, the 17th day of February, and the 20th day of February, 2009. At the hearing the appellant was represented by Mr. Owen Hickey, SC, instructed by Donal O'Hagan & Company. Mr. James Devlin, BL, instructed by the Chief State Solicitor's office appeared on behalf of the respondent, the Commissioner of Valuation. During the course of the hearing the parties called a number of expert witnesses and provided a number of reports in relation to various aspects of the property concerned and its operation. The testimony of these witnesses and the reports will be dealt with in detail in the judgment.

The Issues

2. A number of issues arose during the course of the hearing relating to the quantum of the valuation of the property concerned, and to what extent, if at all, certain elements of plant therein should be valued under Section 51 of the Valuation Act, 2001.

The Property Concerned

3. The property concerned is a large stone quarry occupying a site area of 157.7 hectares located at an elevation of some 300 metres on a minor country road (R114) about three miles south of Tallaght close to the Wicklow border. In the vicinity there are two other quarries – Shillelagh at Ballinascorney and Roadstone De Selby. Both of these quarries were valued as part of the South Dublin County Council revaluation programme and whilst the valuation of the Shillelagh quarry is currently under appeal to this Tribunal, the valuation of the De Selby quarry was agreed at the Section 30 appeal stage.

   On the property concerned there is a PSH Engineering screening and processing plant and a Benninghoven TB240 asphalt plant, together with ancillary workshops/offices/laboratory and stores.

Rating History

4. As part of the revaluation programme for South Dublin County Council the NAV of the property concerned was determined by the Valuation Office at €450,000 as at the relevant valuation date of 30th September, 2005. Following an appeal under Section 30 of the Valuation Act, 2001 the valuation was reduced to €436,000. The appellant, being dissatisfied

with at the Commissioner's decision, lodged an appeal to this Tribunal in accordance with Section 34 of the Act.

5. It is noted that the property concerned was the subject of an appeal to this Tribunal following a revision of valuation in November, 2005. Following an oral hearing held in December, 2006/January, 2007 the rateable valuation of the property concerned was determined at €802 in accordance with Section 49(1) of the Valuation Act, 2001. This determination was based upon an output of 350,000 tonnes for the years 2005 and 2006 with a royalty rate of 25 cents per ton; and an estimated cost of €1,550,000 for the asphalt plant, of which 20% was rateable plant as provided for under Section 51 of the Valuation Act.

Preliminary Issue

6. At the commencement of the oral hearing Mr. Hickey sought leave to introduce a ground of appeal that had not previously been raised, i.e. that the asphalt manufacturing plant situated at the property concerned is designed or used primarily to induce a process of change in the substance contained by it or transmitted through it and consequently is not rateable within the proviso of paragraph 1 of Schedule 5 of the Valuation Act, 2001.

7. Mr. Hickey in submissions said that he had first received instructions to act for the appellant after the appeal to the Tribunal had been lodged. When he had considered all the technical evidence he formed the view that the asphalt manufacturing plant at the property concerned was not rateable under the provisions of Section 51 and Paragraph 1 of Schedule 5. Mr. Hickey said that whilst the general rule was that where a ground of appeal had not previously been advanced before the Commissioner of Valuation it will not be possible to raise it before the Tribunal, nevertheless the determination of the Tribunal in the case of **VA95/5/015 - John Pettitt and Sons Ltd**., was to the effect that the Tribunal "*in exceptional circumstances would permit the reliance on a point of law which had not previously been adduced*". He submitted that the facts in this appeal were such that they fell within the proposition put forward by the Tribunal in that case.

8. The Tribunal, having carefully considered Mr. Hickey's submission and Mr. Devlin's response, found in favour of Mr. Hickey. In arriving at its determination the Tribunal had regard to the **Pettitt** judgment which was subsequently upheld in the High Court and in particularly to the statement at paragraph No. 10 of the Tribunal judgment which states

"*Accordingly it is our firm view that it would be quite wrong to have a practice of exclusion which, given the importance of the case and the interests of justice, did not permit of exceptions or deviations therefrom. So, it is therefore our decision that whilst, as a general rule, where a ground of appeal has not been advanced before the Commissioner it will not be possible to raise it before us nevertheless, in exceptional circumstances where the interest of justice requires, this Tribunal will permit the raising of a ground, the reception into evidence and the reliance on a point of law none of which have previously been so raised or so adduced*". In the circumstances of this appeal the Tribunal has come to the conclusion that argument which goes to the root of rateability in relation to the plant at the property concerned should not in the interest of justice be excluded at this stage in the appeal process. Accordingly counsel was invited to make submissions in this regard that they considered appropriate in the light of the evidence to be adduced by the parties.

Valuation Matters

9. Mr. Tadhg Donnelly, MIAVI of Brian Bagnall & Associates, gave valuation evidence on behalf of the appellant and Mr. Noel Rooney, a Valuer in the Valuation Office gave evidence on behalf of the respondent, the Commissioner of Valuation.

10. Prior to the oral hearing the valuers submitted précis of evidence they proposed to adduce at the oral hearing on behalf of the appellant and respondent. In their précis each valuer put forward their opinion of net annual value of the property concerned at the relevant valuation date of the 30th September, 2005. Both valuers adopted a common approach, in that they each valued the property concerned under four headings, i.e. the Asphalt Plant, the Crushing Plant, the Quarry and Other Ancillary Buildings. The NAV of the first two components were valued on the contractor's basis as provided for under Section 50 of the Valuation Act, 2001. The Quarry was valued on an output/royalty basis and the net annual value of the buildings was agreed in the sum of €81,500.

A. The Asphalt Plant

11. Set out below are the respective valuations in relation to the Asphalt Plant put forward by Mr. Donnelly and Mr. Rooney. Mr. Donnelly's valuation of this element of the property concerned was put forward on a without prejudice basis to the appellant's claim that the entire of the asphalt plant was designed or used primarily to induce a process of change in

substance contained or transmitted and hence not rateable in accordance with paragraph 1 of the 5th Schedule of the Act.

	Mr. Donnelly's Valuation		Mr. Rooney's Valuation
Installation costs **(Agreed)**	€1,550,000		€1,550,000
Allow for movable parts	(80%)		(23%)
Rateable element	€310,000		€1,193,500
Site works **(Agreed)**	€40,000		€ 40,000
Sub total	€350,000		€1,233,500
Fees/levies/planning	-	@ 10%	€ 123,350
Adjusted replacement cost	€350,000		€1,356,850
Add for site (1 acre)	-		€ 140,000
Total replacement cost	€350,000		€1,496,850
NAV @ 5%	€ 17,500		€ 74,842

12. During the course of the hearing the Tribunal indicated that the Rating and Valuation Association had published a document in 1989 dealing with the contractor's basis of valuation for rating purposes, which has been accepted by all those engaged in rating practice. This document contains guidelines which provide that in estimating the replacement cost of an asset, appropriate allowance ought to be made for design costs and fees and that the cost of the site should also be included. The appellant agreed this appeared to be so and, in the event, the aggregate replacement costs of the Asphalt Plant, in accordance with Section 50 of the Act, was agreed as follows:

Cost of plant	€1,550,000
Allowance for moving parts @ 35%	€ 542,500
Net replacement cost of rateable element	€1,007,500
Add for site works	€ 40,000
Sub total	€1,047,500
Fee/levies/planning @ 10%	€ 104,750
Add for site (1 acre)	€ 100,000
Total replacement cost	€1,252,250

Net Annual Value @ 5% Say = €63,000

Note the above valuation was agreed again on a without prejudice basis to the appellant's claim for exemption from rates already referred to.

B. The Screening/Processing Plant

13.

	Mr. Donnelly's Valuation		Mr. Rooney's Valuation
Replacement costs **(Agreed)**	€1,378,500		€1,378,500
Allow for movable parts @ 75%	€1,033,875		€1,033,875
Net replacement cost (rateable)	€ 344,625		€ 344,625
Site works **(Agreed)**	€ 35,000		€ 35,000
Sub total	€ 379,625		€ 379,625
Fees/levies/planning	-	@ 10%	€ 37,962
Add for site (1 acre)	-		€ 140,000
Total replacement cost	€ 379,625		€ 557,587
NAV @ 5%	€ 18,981		€ 27,879

14. In line with the Tribunal's guidance in relation to the Asphalt Plant the net annual value for this element of the property concerned was agreed as set out below:

Agreed replacement costs		€1,378,500
Less allowance for moving parts @ 75%		(€1,033,875)
Net replacement cost (rateable)		€ 344,625
Add for site works		€ 35,000
Sub total		€ 379,625
Fee/levies/planning @ 10%		€ 37,962
Add for site (1 acre)		€ 100,000
Total replacement cost		€ 517,587
	Say	€ 520,000

Net Annual Value @ 5% Say = €26,000

C. The Quarry

15. The Appellant's Evidence

Mr. Fergus Gallagher, ASCS, MRICS

Mr. Fergus Gallagher is a chartered mineral surveyor and is currently the planning and development manager with the appellant company.

In his evidence Mr. Gallagher said the Quarry produces a range of first class stone products, bulk fill products and low grade by-products. The company, he said, did not operate a fixed rate price as such, but marketed the various products within a price range, with a haulage charge depending on a number of factors such as market influences and competition, product type, quantity, time for delivery, distance travelled and the credit history of the customer. During the period from December 2004 to the end of 2006, the company operated a document management system (DMS) but this system is no longer in use. The DMS did not, Mr. Gallagher said, separate out haulage costs so that it is not possible to categorically state the average ex-pit prices achieved during the 2004 to 2006 period, nor indeed was it possible to provide an analysis of the product sales to third parties and inter-group transactions. However, after extensive trawling through the available information, Mr. Gallagher provided the following relevant details of output, production costs and selling prices for the year 2007.

Output

01/01/05 to 31/12/05	315,171 tonnes
01/01/06 to 31/12/06	441,526 tonnes
01/01/07 to 31/12/07	341,876 tonnes

16. In 2007 42% of the output was sold to third parties and the remainder of the output consisted of inter-group sales. No similar analyses are available for the years 2004, 2005 or 2006. Average ex-pit price to third parties was €4.04 per tonne and inter group sales were recorded at €5.00 per tonne.

Production Cost Analysis (2007)

Drilling	€0.17 per tonne
Blasting	€0.70 per tonne
Primary crushing	€1.25 per tonne
Secondary crushing	€0.75 per tonne
Tertiary crushing	€1.25 per tonne
Overheads and profit	€0.82 per tonne
Total	€4.94 per tonne

17. Selling prices for the year 2007 range from €5 to €9.50 per tonne inclusive of haulage costs depending upon the stone quality. Having regard to the fact that the average distance is

between 10 and 15 km, Mr. Gallagher said, the weighted average price exclusive of haulage charge was in the order of €4.97 for the year 2007. In the circumstances he was of the opinion that the weighted average price of €4.50 exclusive of haulage charge was appropriate as at September 2005.

18. Under cross-examination Mr. Gallagher said he could not recall if he had given evidence in relation to ex-pit prices at the previous Tribunal hearing in December 2006 and January 2007. Accordingly, he could not say where the price of €4.50 per tonne came from at that time but understood that the figure was agreed with the Valuation Office at the time of the appeal.

19. In response to a question about the DMS, Mr. Gallagher said the system did not itemise haulage costs and hence it was difficult to give an accurate assessment of the weighted average ex-pit prices. In relation to the business generally, Mr. Gallagher said it was very competitive, and hence the policy of the company was to provide the sales staff with price guidelines so as to give them a degree of tolerance in order to obtain orders.

20. When questioned about his product cost analysis, Mr. Gallagher said the overheads and profits represented 20% of total production cost, and that 50% of this figure, i.e. 10%, could be attributed to staff costs.

Royalties

21. In relation to royalties, the appellant submitted a written report prepared by Mr. Glyn Williams, FRICS, SCS, C.ENV., a chartered mineral surveyor with over 30 years experience.

22. In his report Mr. Williams defined a royalty as *"an amount which a mineral operator will pay to a mineral owner for the right to work that mineral"*. In normal circumstances the royalty would have been negotiated between the parties having regard to market evidence and taking into account the mineral type, ease of working, local competition and the anticipated level of output. In some cases there may be a fixed rent not dependent on output and, in another, the royalty would be based upon a sliding scale depending on output – the royalty normally declining with increased output.

23. In relation to the subject quarry, Mr. Williams pointed out that there are a number of other quarries in the vicinity, including the Roadstone Limestone Quarry in Belgard, a few miles to

the east. Mr. Williams described the subject quarry as having a *"complex geological structure comprising dolerite which has intruded by way of a swarm of dykes into a surrounding country rock consisting of greywacke interspersed with shale and mudstone"*. Greywacke, Mr. Williams said, is a metamorphosed sandstone characterised by its abrasiveness and its hardness. By virtue of these characteristics it is sometimes used in the wearing courses of roads. Dolerite is a medium grained volcanic rock and is a hard and heavy rock and would not be classified as a high specification material for a road stone wearing courses. Mr. Williams stated that the hardness and abrasiveness of dolerite products presented significant difficulties in processing the material for end use. This would give rise to heavy wear and tear on the extraction and crushing apparatus and associated higher processing and production costs.

24. Mr. Williams stated that the nature of the stone produced at the subject quarry as such could not meet the demand from specialised markets, but would have to compete with other quarries in the general aggregates market including concrete manufacture, coated stone and general aggregates uses.

25. In his summary, Mr. Williams said that there were few mineral leases in Ireland and, consequently, limited evidence of open market royalty transactions. In the absence of such evidence, a practice had evolved for the valuation of quarries whereby a notional royalty figure was deduced by applying a percentage of the average ex-pit selling price to the annual output. In regard to the subject quarry, any estimate of royalty should take into account the fact that it is a "hardstone" quarry with high extraction costs.

Mr. Tadhg Donnelly

26. Mr. Tadhg Donnelly in his evidence contended for a rateable valuation of €90,000 in respect of the quarry, calculated as set out below:

Agreed annual output: 400,000 tonnes
Weighted average ex-pit price 2005: €4.50 per tonne
Gross income €1,800,000
Royalty rate @ 5% of ex-pit price income = NAV €90,000

27. In support of his evidence of net annual value, Mr. Donnelly introduced five comparisons, details which are set out in Appendix 2 attached to this judgment. Four of these comparisons are in relation to rating assessments of quarries located in various parts of Ireland which were subject to a revision of valuation under Section 28 of the Valuation Act, 2001. The other comparison (comparison No. 1) is in respect of a quarry located close to the subject property and occupied under a 32 year lease from 7 July 2003. This quarry was let at an initial yearly rent of €31,745 (£25,000) subject to annual increases in line with the Consumer Price Index. This quarry has not been in operation for several years and, hence, planning permission for quarry operations has withered. As part of the lease renewal negotiations, the tenant (Roadstone) undertook to get planning permission for a reopening of quarry activities, in which case they would pay an additional rent calculated at the rate of 2.5% of the ex-pit price. To date, planning permission for reopening the quarry has not been obtained.

28. Mr. Donnelly analysed this transaction as follows.

Estimate annual output:	400,000 tonnes
Estimated ex-pit price:	€4.50 per tonne
Gross income:	€1,800,000
Royalty rent @ 2.5%	€45,000
Fixed rent	<u>€31,745</u>
Total rent payable therefore	€76,745
Devalues at	€0.19 per tonne

Royalty equivalent 4.26% of ex-pit price

29. Mr. Donnelly said that in arriving at his estimate of the average ex-pit price as at September 2005, he had regard to Mr. Gallagher's evidence that the weighted average ex-pit price (exclusive of haulage charges) was €4.97 in 2007. Mr. Donnelly said he had indexed this figure back to 2005 levels using the sand and gravel CSO index, which give him a figure of €4.24 per tonne.

30. Furthermore, Mr. Donnelly said that he had regard to the following factors:

    a) That his method of valuation was in strict accordance with the guidance note issued to Valuers by the Valuation Office in November, 2000. This guidance note indicated a

maximum royalty rate of 7.5%, but Mr. Donnelly said he considered 5% to be appropriate to take into account the inherent disadvantages at the quarry.

b) That the average ex-pit price had been agreed with the Valuation Office at the 2005 revision.

31. When asked to comment on Mr. Rooney's valuation of the quarry, which is based upon an ex-pit price of €6.00 per tonne and a notional royalty rate of 10.5% of the ex-pit price, Mr. Donnelly said he could not understand how Mr. Rooney had arrived at these figures.

32. Mr. Donnelly was also questioned about the valuation of the Shillelagh Quarry (Mr. Rooney's comparison No. 1) located close to the subject, which was also valued as part of the South Dublin Revaluation Program. In this instance the valuation had been fixed at €240,000 following representations by Mr. John Barnett & Associates, Chartered Mineral Surveyors. Mr. Donnelly said that he had spoken to the occupiers of this property and they had advised him that they had intended to lodge an appeal against this assessment, but had failed to do so within the 40 day statutory appeal period as provided for under the Act.

33. In relation to Mr. Rooney's other comparisons, Mr. Donnelly said he did not consider them to be of assistance for a variety of reasons including: low output (Comparison No. 2); the fact that it was the best limestone quarry in the greater Dublin area producing a better/more valuable stone (Comparison No. 3); Behans Quarry (Comparison No 4) under appeal to this Tribunal.

34. When asked by Mr. Devlin if he had any evidence of open market royalty transactions, Mr. Donnelly said such transactions were uncommon and the only market evidence he had was in relation to his Comparison No.1 already referred to. When asked to comment on Mr. Rooney's evidence in relation to royalty rates, Mr. Donnelly said they were not relevant, in that they were (with the exception of Kildare Sand and Gravel) all located in rural locations far removed from Dublin, and had relatively low level outputs.

35. Under cross-examination Mr. Donnelly agreed that the only difference between his valuation and Mr. Rooney's was the average ex-pit price and the appropriate percentage to be applied to this figure in order to arrive at a royalty for valuation purposes. In relation to the former, Mr. Donnelly said he had relied on Mr. Gallagher's evidence that the average ex-pit price

was €4.97 per tonne for the year 2007, which gave an indexed figure of €4.22 in 2005. Nonetheless, Mr. Donnelly said, he had valued the output at €4.50 per tonne, which was the figure agreed at the 2005 revision. When it was put to him that at the previous 2005 Tribunal stage he had put forward an adjusted ex-pit price of €2.42 per tonne and that the royalty rate of 25c per tonne used by the Tribunal on this determination was equivalent to approximately 10% of this figure, Mr. Donnelly agreed that this was correct. Mr. Donnelly also agreed that Mr. Rooney's Comparison No 2 (De Selby Roadstone) was beside the subject.

Respondent's Evidence

36. Mr. Rooney (Dip. Env Econ) is a staff Valuer in the Valuation Office with over 35 years' experience and, in particular, with over 2 years' experience in valuation of quarries.

37. In his evidence Mr. Rooney valued the quarry element of the property concerned as set out below:

Output	400,000 tonnes
Average ex-pit price per tonne	€6.00
Gross income	€2,400,000.00
Royalty rate @ 10.5%	
NAV	€252,000.00

38. Mr. Rooney said that he was responsible for valuing all the quarries in the South Dublin local authority area as part of the revaluation programme. As part of this exercise he had written to all the quarry operators seeking information in relation to the range and quality of their various products for the period from 2004–2006. He had also sought information in regard to ex-pit prices to third parties and details of inter-company sales. In relation to the subject property, the only information he had received was in November 2007 to the effect that the average ex-pit price for the combined quarry products was €4.00 per tonne.

39. Mr. Rooney said that arriving at what he considered to be the appropriate royalty rate to apply to the ex-pit prices, he had regard to evidence given by a well known mineral surveyor, Mr. John Barnett, in relation to an appeal to this Tribunal – **VA96/2/044 – Dan Morrissey Ltd.** In that appeal, Mr. Barnett said, royalty charges would vary with location, with higher charges being paid for quarries located close to the major

conurbations. Mr. Barnett in his evidence at that time also said that he had no market evidence upon which to base his stated opinion of royalty in that appeal.

40. Mr. Rooney said he had examined the data contained in the Valuation Office records in regard to royalties being paid for quarries located throughout Ireland. (A copy of Mr. Rooney's evidence in this regard is contained in Appendix 3 attached to this judgment.)

41. Mr. Rooney said the valuation method for valuing quarries was a two stage exercise - annual output multiplied by a percentage of the average ex-pit price. Mr. Rooney said that there was a high demand for stone in the Dublin area at the relevant valuation date, but nonetheless he could find no market evidence of royalties paid. In the absent of such local market evidence he had put forward all the evidence of royalties he could find. He acknowledged that these were in relation to quarries in areas which would not have the same demand levels as Dublin. Mr. Rooney said he also had regard to the findings in two recent Tribunal cases: **VA06/3/041 - Kilsaran Concrete** and **VA06/3/047 - Shillelagh Quarries Ltd.**

42. When asked about his comparisons, Mr. Rooney said that Shillelagh Quarry (Comparison No. 1) was not as good as the subject and this was reflected in his valuation.

43. Under cross-examination Mr. Rooney agreed that he first valued the property concerned at €450,000, which figure was reduced on appeal to €436,000. Mr. Rooney further agreed that the figure of €436,000 was the valuation placed on the property concerned by the Appeal Officer, Mr. Frank O'Connor, after due consideration of the appellant's appeal and his (Mr. Rooney's) comments on the appellant's observations. As of now he was the officer appointed by the Commissioner to appear at the hearing, and the valuation under appeal was that determined by Mr. O'Connor.

44. Mr. Rooney said that he had about two years' experience in valuing quarries and had carried out an extensive research of all available data contained in the Valuation Office records before commencing his appointed task of valuing all the quarries (five in number) in the South Dublin revaluation programme. Mr. Rooney said he had rejected the information received from the appellant that the average ex-pit price was €4.00 per tonne, firstly on the grounds that this was a lesser figure than that agreed at the 2005 revision

appeal stage, and, secondly, on the basis of the research he had carried out, which indicated an average ex-pit price of €6.00 per tonne. In this regard he pointed out that he had used an ex-pit price of €5.00 per tonne when valuing the nearby Shillelagh Quarry at representation stage.

45. When asked about Mr. Gallagher's evidence that the average ex-pit price for 2007 was €4.97, which when indexed back gave a price of €4.24 per tonne in 2005, Mr. Rooney said he had no reason to dispute the information put forward by Mr. Gallagher in this regard. He also acknowledged that Mr. Gallagher had done his best in providing this information, given the inadequate records that were available to him. Nonetheless, Mr. Rooney said, he was satisfied with his estimate of €6.00 per tonne having regard to the location of the property concerned and that the output varied in quality from low grade material to good quality stone. In the absence of any information from the appellant, despite requests from him, Mr. Rooney said he had no alternative but to exercise his judgment as best he could.

46. Under further cross-examination Mr. Rooney said he had read the Tribunal judgment in relation to the 2005 revisions for the subject property and the Shillelagh Quarry, and had come to the conclusion that €4.50 per tonne mentioned in the judgment was on the low side. He conceded, however, that he had no market evidence to support his opinion, nor indeed the €6.00 per tonne that he had applied to the output.

47. When questioned about the royalty of 10.5%, Mr. Rooney said he had arrived at this on the basis of the royalty evidence gathered by him from the data contained in the Valuation Office records. He had analysed his evidence as best he could and taking into account that the property concerned was located in the greater Dublin area where there was a strong demand for stone of quality equal to that extracted at the subject quarry. Mr. Rooney said he would have liked to have had better royalty evidence, but in the end he had to do his best with that available to him.

48. When questioned about the Valuation Office guidance note in regard to the valuation of quarries, Mr. Rooney said he would have had regard to it when valuing quarries at revision stage under Section 28, but when it came to the South Dublin revaluation he considered it more appropriate to have regard to all the market evidence available to him,

and this is what he had done. This evidence, such as it is, is evidence of open market arm's-length transactions, and it is the best available to him, and no other such evidence was provided by the appellant, or indeed by any other quarry operator in the South Dublin local authority area.

The Legal Issue

Asphalt manufacturing process

49. Mr. Chris Lycett, BSc, MIAT, FIHT, who is the Technical Manager/Director at Irish Tar & Bitumen Suppliers Dublin, with over 17 years' experience in that company, and was previously a senior research person in the road construction section in An Foras Forbartha, gave evidence in relation to the manufacture of asphalt.

50. In his evidence on behalf of the appellant Mr. Lycett described asphalt as being a blend of bitumen, stone, sand and a filler (fine calcium carbonate). The manufacturing process, he said, commences when the stone and sand are fed by front-end loaders into designated intake hoppers, where the desired quantities are weighed and dispatched by conveyor to the rotary dryer. The aggregates are then heated and water driven off as steam. The dried "stone" is then lifted by a bucket elevator to the top of the mixing tower. At this stage the hot stone is screened to predetermined size fractions on vibrating screens and discharged to several hot stone bins, depending on size fraction. The next stage in the manufacturing process is the pumping of bitumen from the insulated silos to the bitumen weigh vessel, from which it is discharged to the mixing pan where it is then mixed together with the carefully weighed hot stone and filler to form the asphalt. Once mixed, the asphalt is either loaded directly into a waiting truck or carried by track-mounted skips to the hot storage bins, where it is held pending collection by customers. The resulting products manufactured at the property concerned, which contain approximately 5% bitumen, are mainly used in road construction.

51. Mr. Lycett said that during the manufacturing process, the bitumen coats the mineral matter to produce a hot mixture. During this process the bitumen undergoes a change, oxidizes, and hardens through heating and exposure to air. This change is irreversible. This stiffening of the bitumen enhances the properties of the new product to create a material that can be spread by paving machines as a road surfacing material.

52. He also pointed out that it is not possible, commercially, to reconstitute the ingredients. The hardening effect can be expressed by a change in the penetration value of the bitumen. The penetration is a means of defining the consistency of the bitumen product.

53. Under cross-examination, Mr. Lycett said that the actual mixing process of the ingredients would last from between 45 seconds to 2 minutes, depending upon the mix design. He also agreed that no change took place in the bitumen or other constituent parts until these were delivered to the mixer, and it was at this point that the change of substance occurred, leading ultimately to the formation of asphalt through the loss of heat and exposure to air.

54. Mr. John J. Lauder, MSc, BE Dip Eng Comp, Dip Envir. Mgt, C. Eng, MIEI, is a consultant engineer with extensive experience in civil and structural engineering, who is currently employed as a senior lecturer in the Dublin School of Architecture, DIT. Mr. Lauder also runs his own consulting engineering practice, specialising predominantly in structural engineering. Mr. Lauder prepared a written report on the manufacture of asphalt on behalf of the respondent, a copy of which was received into evidence by the Tribunal.

55. In his evidence Mr. Lauder described asphalt as being a precise blend of bitumen (a tar like substance derived from the heaviest oils) and graded coarse and fine aggregates. Bitumen, he said, is an organic material made up of a mixture of heavy crude oils remaining after the distillation of the oils used in the transport and energy areas. It is dark brown to black, semi-solid or solid.

56. Mr. Lauder's evidence in relation to the manufacturing process is essentially the same as that of Mr. Lycett's. In his report, Mr. Lauder emphasised that bitumen is delivered in a heated molten state and must remain so in order to retain its viscosity at all times during the storage and mixing process. The asphalt mix must also remain heated until delivered on site and off-loaded into the spreading machine and laid in thin strips onto the roadway. At this stage the asphalt solidifies with the reduction of its temperature and on exposure to air.

57. Mr. Lauder, in his report, stated that the batching plant at the property concerned is used for the premixing of the constituents of asphalt. The mixture becomes asphalt only after it is extruded into its final position in a roadway.

Legal Submissions

Mr. Hickey on behalf of the appellant contended that his case for the exemption of the asphalt manufacturing plant was based upon the premise that plant which was designed and used primarily to induce a process of change in the substance contained by it or transmitted through it is unrateable. Mr. Hickey referred to the definition of plant in section 3 of the Valuation Act, 2001 viz:

"Plant" means –

(a) any fixture or structure so attached or secured to, or integrated with, premises comprising any mill, factory or building erected or used for any such purpose as to be of a permanent or semi-permanent nature or,

(b) any fixture or structure associated with such premises that, although free-standing, are of such size, weight and construction as to be of a permanent or semi-permanent nature;

Mr. Hickey then referred to section 51(1)(a) of the Act which stated:

"In determining, under any provision of this Act, the value of a relevant property, the following shall be valued and taken account of in such determination -

(a) any plant in or on the property, being plant specified in Schedule 5"

and to Schedule 5 of the Act which defined plant referred to in section 51 stated a follows:

"1.- All constructions affixed to a relevant property (whether on or below the ground) and used for the containment of a substance or for the transmission of a substance or electric current, including any such constructions which are designed or used primarily for storage or containment (whether or not the purpose of such containment is to allow a natural or a chemical process to take place), but excluding any such constructions which are designed or used primarily to induce a process of change in the substance contained or transmitted.

2.—All fixed furnaces, boilers, ovens and kilns.

3.—All ponds and reservoirs."

Mr. Hickey in support of his case added that the appellant's engineering and valuation evidence heard by the Tribunal clearly demonstrated that the installations in the respective locations were designed or used primarily to induce a process of change in the substance contained or transmitted and came squarely within the ambit of Schedule 5.

Mr. Hickey stated that the critical test for exemption on this basis was the *'what goes in – what goes out test.'* Mr. Hickey contended that this test, applied by both the Tribunal and the Courts, was grounded on whether the substance emerging from an installation at the end of a process was materially different from the substance introduced to the installation at the commencement of the process and the primary purpose of the installation was not storage or containment.

Mr. Hickey cited the following key cases in support of his contention:

- **VA95/4/026 - Carbery Milk Products v Commissioner of Valuation**
- **Caribmolasses Company Ltd. v Commissioner of Valuation [1994] 3 IR 189**
- **VA97/5/010 - Irish Fertilizer Industries Ltd. v Commissioner of Valuation**
- **Cronin (Inspector of Taxes) v Strand Dairy Limited. HC unreported 18th December, 1985**

In the **Carbery** case, where the rateability or otherwise of eight milk tanks was in issue, it was held by the Tribunal that three of the tanks were rateable and five non-rateable. In relation to the three tanks held to be rateable the Tribunal was satisfied *"that what goes into those tanks is skimmed milk and what comes out likewise is the same skimmed milk."* However, in relation to the five tanks held not to be rateable the Tribunal stated that *"what in fact goes in is raw milk which has a certain ascertainable percentage of fat and protein content and what comes out is not that milk with that content but rather milk with quite a different content of both fat and protein. It is neither raw milk in its natural state nor skimmed milk in its natural state. It is a product different from both."*

In **Caribmolasses**, which was a case stated by the Tribunal for the opinion of the High Court as to whether the tanks in question used for holding, containing and blending molasses were rateable, Blayney J. in his judgment following appeal to the Supreme Court held that the tanks were rateable plant as the molasses was not changed in the tanks and there was no

evidence that the tanks were designed or used primarily to induce a process of change in the molasses and if there was change, it took place outside the tanks. Cases mentioned in the course of this hearing were:

- **Beamish and Crawford v Commissioner of Valuation [1980] ILRM 149** (which was distinguished);
- **Cement Ltd. v Commissioner of Valuation [1960] IR 283**
- **Pfizer Chemical Corporation v Commissioner of Valuation, HC unreported, 9th May, 1989 and SC, unreported 28th July, 1994**
- **Bulmers Limited (Formerly Showerings (Ireland) Ltd.) v Commissioner of Valuation, SC unreported, 30th July, 2008.**

In **Irish Fertilizer Industries Ltd.** it was determined by the Tribunal that the Prill Tower, which was a substantial structure, and the final stage of the urea manufacturing process in which a stream of molten urea at one hundred and forty degrees centigrade is converted into small spherical particles of solid urea (prills) at ambient temperature, is exempt from rateability.

In **Cronin (Inspector of Taxes) v Strand Dairy Limited**, a case concerned with the meaning of the words “goods manufactured” and specifically with reference to milk, it was accepted by the Supreme Court that in order for there to be a “manufactory” the process must bring about some change in the substance subjected to the process and that can be satisfied if in the final analysis there emerges a commercially different product.

In conclusion, Mr. Hickey stated that although included in his submissions, **Caribmolasses** was a poor case with the focus on tanks. In the subject case, he added, there were two distinct installations primarily to induce a process of change. Several ingredients went in at one end and a new product emerged at the other end.

Mr. James Devlin, on behalf of the respondent rejected Mr. Hickey’s arguments for exemption of the said installations for the following reasons:

1. The process of change relied upon must take place in the container for which exemption is sought. In his submission he referred to Blayney J’s Judgment above, again in

Caribmolasses, the effect of which was that exemption was restricted to where the process of change took place - in that case *"after the molasses had left the tanks"* and thus the tanks as such were rateable.

2. Blending does not of itself constitute a process of change.

3. Each individual element must be considered. The Tribunal cannot look at the installation as a single unit engaged in a continuous process. In support of this view Mr. Devlin referred again to **Caribmolasses** and to the parallel drawn in that case with the facts in **Beamish and Crawford**, and as a consequence of which the Court was asked to look at the respondent's installation as a single unit engaged in a continuous process and if it accepted such that the tanks included would be deemed non-rateable plant. The Supreme Court, however, rejected this proposition.

4. The *"what goes in - what goes out"* test is not definitive. Mr. Devlin submitted that this test was not applied by the Supreme Court in **Caribmolasses** or **Bulmers.** The test, he added, did not address in any way the difference between *'allowing'* and *'inducing'* a process, a distinction which has been embraced by the legislature.

In summary Mr. Devlin relied on the 'individual element' – the process of change must take place in the container for which the exemption is sought as per **Caribmolasses.** The Supreme Court, Mr. Devlin argued, was saying that "it doesn't matter if there was a process of change somewhere along the line, each individual container or each individual element of plant used for the transmission of a substance cannot be exempt unless a process of change has taken place in that particular item." Mr. Devlin referred to Mr. Hickey's criticism of Mr. Richard Cooke, SC in **Caribmolasses** in which he drew a parallel with **Beamish and Crawford,** but submitted that Mr. Hickey was making the exact same case here himself in attempting to prevail upon the Tribunal to view the subject installations as continuous processes. The notion was not accepted in **Caribmolasses** and should not be accepted here, Mr. Devlin urged, when a process of change which took place in the pipes was insufficient to exempt the tanks.

Mr. Devlin outlined what the Act provided in Schedule 5 with regard to Plant referred to in section 51 as relevant rateable property and excerpted as follows *"Including any such*

constructions which are designed or used primarily for storage or containment (whether or not the purpose of such containment is to allow a natural or a chemical process to take place.)" He contended that a natural or chemical process takes place in something which is designed and used primarily for storage or containment. Mr. Devlin submitted that the operative word is *'allow'*. If a process including a process of change is *'allowed'* then it is rateable. On the other hand, if a process of change is *'induced'* as opposed to *'allow'* then it is exempt, he added, referring to dicta from Finnegan J. in **Bulmers** where the distinction was explained. *"'Allow' means to permit and it connotes passivity or the occurring of a process without active intervention 'whereas' 'induce' connotes active intervention."* The problem with the *'what goes in – what goes out'* test, Mr. Devlin contended, is that even if there is a change, no distinction is drawn as to whether that change was allowed or induced.

Mr. Devlin also urged the Tribunal to consider the items of plant included in the subject appeals on an individual basis, adding that **Caribmolasses** was authority for that. Replying to a question from the Tribunal, Mr. Devlin confirmed that it was the respondent's case that the subject plant was a series of constructions in contrast to Mr. Hickey's contention on behalf of the appellant that it is simply one construction.

The Issue Involved in this Appeal

The key issue to be addressed in respect of the asphalt plant in this appeal is:

Can the asphalt plant be deemed to be one installation/structure?

If the answer is yes, it is non rateable.

If the answer is no, it may be part rateable.

Key Definitions

Relevant Property – Schedule 3

"(a) Buildings

(b) Lands used or developed for any purpose (irrespective of whether such lands are surfaced) and any constructions affixed thereto which pertain to that use or development."

"Building" includes a structure, whatever the method by which it has been erected or constructed. (Section 3, 2001 Act)

"Plant" means –

(a) any fixture or structure so attached or secured to, or integrated with, premises comprising any mill, factory or building erected or used for any such purpose as to be of a permanent or semi-permanent nature, or

(b) any fixture or structure associated with such premises that, although free-standing, is of such size, weight and construction as to be of a permanent or semi-permanent nature;

<u>Section 51</u>

(1) In determining, under any provision of this Act, the value of a relevant property, the following shall be valued and taken account of in such determination –

(a) any plant in or on the property, being plant specified in Schedule 5,

(b) the water or other motive power (if any) of the property, and

(c) all cables, pipelines and conduits (whether underground, on the surface or overhead and including all pylons, supports and other constructions which pertain to them) that form part of the property.

(3) Nothing in paragraph (b) of subsection (1) shall be construed as permitting the value of any machinery in or on the property concerned (not being machinery that constitutes plant specified in Schedule 5) to be taken account of under that subsection unless it is machinery erected and used for the production of the motive power concerned.

(5) Notwithstanding anything in paragraph (a) of subsection (1), a part of any plant referred to in that paragraph which is capable of being moved by mechanical or electrical means, other than a telescopic container, shall not be valued or taken account of in the determination of the value of the property to which it relates.

<u>Schedule 5</u>

Plant referred to in Section 51

1.- All constructions affixed to a relevant property (whether on or below the ground) and used for the containment of a substance or for the transmission of a substance or electric current, including any such constructions which are designed or used primarily for storage or containment (whether or not the purpose of such containment is to allow a natural or a chemical process to take place), but excluding any such constructions which

are designed or used primarily to induce a process of change in the substance contained or transmitted.

What Happens in the Asphalt Plant?

Stage 1 - All materials required for the making of asphalt are delivered to the site, i.e. asphalt and aggregates

Stage 2 - The materials delivered are stored in appropriate containers depending on their nature:

- Asphalt in insulated and heated silos
- Sand/gravel, either in hoppers or on surface

Stage 3 - Making of Asphalt:

Asphalt is made by mixing the two main ingredients at appropriate levels, depending upon the purpose for which the asphalt is required. Mixing takes place in the mixer and lasts between 45 seconds and two minutes. Once mixed the asphalt is dispatched to the waiting lorry for onward delivery to the customer or stored in hot storage bins where it is held pending collection.

Findings

1. The parties to this appeal were represented by counsel and the Tribunal is greatly indebted to them for the depth and quality of their submissions and extensive range of authorities referred to at the Tribunal, which were of great assistance to us at arriving at our determination.
2. The Tribunal also commends all the witnesses who appeared before us and who gave their evidence – much of it being of a highly technical nature – in clear and precise terms, which also benefited us greatly in our determination.
3. The evidence and arguments adduced at the oral hearing, which extended over several days' hearing, raised a number of issues of a legal and valuation nature. In arriving at our determination, we propose to deal firstly with the substantive legal issue as to whether or not the entire plant at the property concerned constitutes a single entity designed or used primarily to induce a process of change in the substance contained or transmitted so as to render it exempt from rates in accordance with Schedule 5 of the Valuation Act, 2001.

Legal Issue

4. The Tribunal has reviewed in depth the law and the authorities relied upon by both appellant and respondent with regard to the exemption issue in these appeals.
5. The appellant on the one hand contended for exemption from rateability on the grounds that the asphalt plant constituted a single installation/structure wherein a process of change was induced. In support of this argument Mr. Hickey cited in particular **Carberry Milk Products**, where five of eight milk tanks were deemed non-rateable on the ground that the end product differed from skimmed milk which went into the tanks. In effect, it was advanced that a process of change had been induced and this test is referred to as the *"what goes in - what goes out"* test. This test was also canvassed in **Caribmolasses,** but the Court on that occasion found that no process of change had been induced in the molasses tanks. Crucially, the Court added that if change had taken place, such change took place outside the tanks, implying tacit acceptance of the overall principle.
6. The appellant also sought further solace in **Irish Fertilizer Industries**, a decision of the Tribunal in which it was determined that plant size was no bar to exemption from rates, referring to the Prill Tower concerned.
7. The remit of the *"what goes in - what goes out"* test was challenged by the respondent. Mr. Devlin, referring to its limitations, argued on the basis of **Caribmolasses** that the process of change must take place in each individual container or each individual item of plant used for transmission of a substance. Single installations or structures *per se* did not qualify for exemption.
8. Schedule 5 defines rateable plant *inter alia* as follows:

   "*All constructions affixed to a relevant property (whether on or below the ground) and used for the containment of a substance or for the transmission of a substance or electric current, including any such constructions which are designed or used primarily for storage or containment (whether or not the purpose of such containment is to allow a natural or a chemical process to take place), but excluding any such constructions which are designed or used primarily to induce a process of change in the substance contained or transmitted."* This Schedule replicated section 8 of the Valuation Act, 1986.
9. In **Bulmers**, on appeal from a Valuation Tribunal decision, the High Court, and on further appeal the Supreme Court, was asked whether a number of vats associated with the manufacture of cider were (a) used primarily for containment for allowing the natural process of fermentation to take place or (b) used primarily to induce a process of change in the substance contained.

It was held on the facts in affirmation of the Tribunal's decision that the process of change which takes place is a consequence of containment with little else and that vats accordingly were not used primarily to induce that process.

In the course of that judgment the Court held that particular regard had to be paid to the following words:

(a) Containment – *"is a category of use and in the absence of any contrary indication is to be given its ordinary meaning."*

(b) Storage –*"connotes containment against future use* [and means] *containment until required for use* [in a particular process].*"*

(c) Allow – *"means to permit and it connotes passivity or the occurring of a process without active intervention."*

(d) Induce – *"connotes active intervention."*

10. The Tribunal finds on the facts, and on interpretation and evaluation of the authorities opened to it in the course of the hearing, that there is no case for blanket exemption in respect of the installations under appeal. It is clear from the evidence of Mr. Lycett and Mr. Lauder that no physical or chemical change in the constituent elements that make up bitumen occurs until they are brought together in the mixing pan. The process of change, once initiated, is irreversible and continues for some time after the bitumen, in its still molten state, is laid in its final position in the roadway.

    On the other hand, the Tribunal is of the view that the said installation must be seen as the totality of individual items of plant, of which some may qualify for exemption from rateability, and others will not, dependent on whether a process of change is induced in the substance contained therein. In the circumstances, the Tribunal finds that the rateable element of the asphalt plant is that agreed by the parties on a without prejudice basis i.e. a net annual value of €63,000.

Valuation Issue

11. The relevant valuation date for the South Dublin revaluation programme is 30th September, 2005.

12. The property concerned consists of four separate elements and, during the course of the hearing, agreement was reached in relation to the valuation of all of these, save for that to be attributed to the quarry.
13. It is common case that the annual output of the quarry for valuation purposes is 400,000 tonnes. The only matters in dispute therefore are:
    - What is the appropriate average ex-pit price at the valuation date? and
    - What percentage of that figure should be taken as being the royalty for the purposes of determining the net annual value of the quarry?
14. For a quarry to be economically viable, the extracting and processing cost, plus other associated costs, must be less than the selling price, which ultimately is determined by market forces which include demand, competition and the level of construction activity.
15. Where low level products, such as aggregate, for use in construction or other major infrastructural works are concerned, the delivery costs are relatively high compared to the ex-pit price of the product. As a consequence, the customer base tends to be drawn from within quite a restricted radius of the quarry.
16. In South Dublin there is a small number of quarries, all of which are owner-occupied, with the exception of the quarry at Slievenabawnoge which is occupied under a 32-year lease arrangement. Accordingly, therefore there is a paucity of open market royalty arrangements in the vicinity for use as evidence in valuing the subject quarry.
17. A royalty is a payment made for the right to extract, process and sell the mineral, calculated at a rate per tonne basis on the amount of product extracted. In market circumstances the price per tonne will be agreed between the parties and whilst it may vary relative to output and the type of stone extracted, it will not usually be related to the ex-pit price of the stone.
18. In the absence of market-based evidence, a practice has evolved for the valuation of quarries for rating purposes whereby a notional royalty rate per tonne is determined by applying a appropriate percentage of the average ex-pit price of the stone.
19. Mr. Donnelly, the Valuer for the appellant, assumed an average ex-pit price of €4.50 per tonne as at the rateable valuation date of September 2005. In arriving at this figure Mr. Donnelly relied on two pieces of evidence: firstly, the evidence put forward by Mr. Gallagher, the Planning and Development Manager of the appellant company, that the average ex-pit price achieved in 2007 was €4.97; secondly, the ex-pit price agreed with

the Valuation Office at the time the subject quarry was valued at the 2005 revision was €4.50 per tonne, which figure was not disputed by Mr. Rooney.

20. Mr. Rooney, the Valuer for the respondent, assumed an average ex-pit price of €6.00 per tonne, but introduced no relevant market-based evidence to support this figure. Indeed Mr. Rooney's only evidence in this regard was the fact that the ex-pit price agreed in the relation to the nearby De Selby quarry was "€4.00 + per tonne", and €5.00 per tonne for the Shillelagh quarry discussed at representation stage with Mr. Tim Paul of John Barnett & Associates, Chartered Mineral Surveyors. There appears to be some doubt as to whether or not Mr. Paul had either agreed or acquiesced to this figure at representation stage.
21. Mr. Williams in his evidence described the rock extracted at the subject as being *"hard and heavy"* and hence could not be described as *"a high specification material for roadstone wearing purposes"*.
22. Having regard to Mr. Gallagher's evidence and Mr. Williams's evidence, the Tribunal has come to the conclusion that the appropriate average ex-pit price for the purpose of this appeal is €4.50 per tonne. In arriving at this price the Tribunal also notes that this was also the agreed figure put forward by both parties at the 2005 revision appeal to this Tribunal. No satisfactory evidence was adduced at this hearing to show why this figure should not apply for revaluation purposes.
23. As far as the royalty rate is concerned there is little evidence of open market transactions and, such as there is, is of limited assistance having regard to the location, the nature and quality of the stone extracted, and the level of output of the quarries concerned. All of these are major considerations, together with anticipated ex-pit price achievable and the likely extraction cost that a hypothetical tenant would take into account when negotiating a royalty rate on a per tonne basis.
24. Mr. Donnelly in his evidence considered a notional rate of 5% of the average ex-pit price to be appropriate and relied upon the Slievenabawnoge transaction. Mr. Rooney, on the other hand, put forward a figure of 10.5% and introduced details of a number of transactions made in regard to quarries located well outside the Dublin catchment area, with small output relative to the subject quarry. Mr. Rooney also relied on the information contained in the three comparisons he introduced.
25. The respective royalty figures put forward by the valuers are in essence subjective opinions based upon limited market evidence unsupported by any analyses of the sale price of the stone and the extraction costs involved. Mr. Gallagher in his evidence said

that the average ex-pit price in 2007 was €4.97 per tonne and produced a schedule of extraction costs totalling €4.12 per tonne exclusive of overheads and profits. Whilst all the stone extracted goes through the primary crushing process only about 40% would appear to proceed to the tertiary crushing stage. On this assumption the average extraction costs come to about €3.40 per tonne leaving the gross profit for the year 2007 to be somewhere in the region of €1.57 per tonne to cover staff costs, all other operating costs, return on capital invested, operators risk and return, rates and notional royalty payment. Having regard to Mr. Gallagher's evidence in relation to staff costs and extraction costs and taking into account the nature of the stone extracted the Tribunal has come to the conclusion that a notional royalty of 9% of average ex-pit price, in this instance is fair and reasonable.

Determination

Having regard to the foregoing findings and all the evidence and arguments adduced, the Tribunal determines the net annual value of the property concerned to be as set out below:

a) The Quarry

Annual output – as agreed	400,000 tonnes
Average ex pit price per tonne	€4.50
Estimated Gross Annual Income	€1,800,000.00
Royalty rate @ 9%	x 0.09
Net Annual Value	€162,000.00

b) The Asphalt Plant

Net Annual Value – As agreed	€63,000.00

c) The Screening/Processing Plant

Net Annual Value – As agreed	€26,000.00

d) Buildings, etc.

Net Annual Value – As agreed	€81,500.00
Net Annual Value of Property Concerned	€332,500.00

And the Tribunal so determines.