Appeal No. VA08/5/188

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Kilsaran Concrete **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Property No. 464562, Concrete Works at Lot No. Tallaght By Pass, Oldbawn, Tallaght, 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 €150,000 on the above described relevant property.

The grounds of Appeal as set out in the Notice of Appeal are:
"We submit that the valuation is excessive and inequitable when appropriate costings in relation to rateable plant and other factors are taken into consideration"

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1. With the mutual consent of the parties this appeal was heard contemporaneously with appeal VA08/5/187 – (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.

Property Concerned

3. The property concerned is a "Readymix Concrete" manufacturing plant together with associated administration buildings occupying a prominent location at the junction of the M50 and the Tallaght bypass.

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 €164,000 as at the relevant valuation date of 30th September, 2005. Following an appeal under Section 30 of the Valuation Act this figure was reduced to €150,000.00 by the Commissioner of Valuation. The appellant, being dissatisfied at the Commissioner's decision, lodged an appeal to this Tribunal under Section 34 of the Act.

Preliminary Issue

5. 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 concrete manufacturing plant situated at the property concerned is designed or used primarily to introduce a process of change in

the substance contained by it or transmitted through it and consequently is not rateable within the provisions of paragraph 1 of Schedule 5 of the Valuation Act, 2001.

6. 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 concrete 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.

7. 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 was 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 there from. 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.

Appellant's Evidence

8. Mr. Nick Davis is an associate member of the Institute of Concrete Technology and is currently the group technical manager for Kilsaran Concrete.

9. In his evidence Mr. Davis gave an overview of the concrete manufacturing process and described the plant at the property concerned as being typical of other concrete plants used to provide ready mixed concrete.

10. Mr. Davis said that the manufacture of concrete involves the mixing of predetermined quantities of cement, aggregates, admixtures and water in a carefully controlled manner to specific designed recipes. This is achieved by the use of a number of weighing and measuring devices to dose each mix with the correct constituents as per the mix design. Concrete in its final form, he said, is used in all types of construction, including motorways, bridges, sea defences, new offices and homes.

11. Mr. Davis said that when cement and water are mixed together a chemical reaction is initiated which starts off a process of change. The reaction and the reaction products are referred to as hydration and hydrates or hydrates phases, respectively. As a result of the immediate start of the reactions, a stiffening can be observed which is initially slight but which increases with time. The point at which the stiffening reaches a certain level is referred as the "start of setting". Further consolidation is called setting, after which the hardening phase begins. The compressive strength of the material then grows steadily over a period that ranges from a few days in the case of "ultra-rapid-hardening" cements, to several years in the case of ordinary cements. These reactions, he said, are mostly exothermic, i.e. heat is given off, and an indication of the rate of reaction is given by examining the amount of heat that is given off.

12. Mr. Davis said that almost immediately on adding water some of the clinker sulphates and gypsum dissolve producing an alkaline, sulphate-rich solution. Soon after mixing the (C_3A) phase - the most reactive of the clinker minerals - reacts with the water to form an aluminate-rich gel (Stage 1). The gel reacts with the sulphate in the solution to form small rod-like crystals of ettringite. C_3A hydration is a strongly exothermic reaction but it does not last long and is followed by a period of a few hours of relatively low heat evolution. This is called the dormant or induction period (Stage II). The first part of the dormant period – up to perhaps

half way through - corresponds to when concrete can be placed. As the dormant period progresses, the paste becomes too stiff to be workable.

13. At the end of the dormant period, Mr. Davis said, the alite and belite in the cement start to hydrate with the formation of calcium silicate hydrate and calcium hydroxide. This corresponds to the main period of cement hydration, (Stage III) during which time concrete strengths increase. The cement grains react from the surface inwards and the anhydrous particles become smaller. C_3A hydration also continues, as fresh crystals become accessible to water. The period of maximum heat evolution occurs typically between about ten and twenty hours after mixing and then gradually tails off.

14. Having described the process in great detail Mr. Davis concluded that the concrete batching plants are designed and used to induce the process of change known as hydration by bringing the various components of cement, aggregates, water and admixtures together.

Mr. Gerard Fogarty's Evidence

15. Mr. Fogarty is a staff member of Concrete and Quarry Engineering and Manufacturing Services (CQEMS) the company which manufactured, supplied and commissioned the concrete batching plant at the property concerned.

16. In his evidence Mr. Fogarty outlined in some detail the various stages in the manufacturing process and itemised those parts of the plant which he considers to be "moving parts". Concrete, he said, is a mixture of concrete, water and aggregates all of which are delivered and stored on site until such time as they are introduced into the manufacturing process. The concrete, which is made to a variety of specifications depending on the end use, is made on the demand and ultimately discharged into drums mounted on heavy goods vehicles for onwards delivery to the construction site.

17. Mr. Fogarty said that there were twelve aggregate bins, all of which were mounted on a grid and fitted with a vibrator in order to ensure that all the material is discharged onto the conveyor feeder belt underneath. The material is then transported to a "way bin" where it is weighed before being transported onwards to a second way bin where it is held for twenty seconds before being discharged onto a cross conveyor which brings the material onto the

batch conveyor. Both of these bins are fitted with vibrators to ensure all the material is fully discharged.

18. The cross conveyor which is carried on a metal frame set in concrete is fitted with electric motors, gear box, pulleys, feed belts, head drums, tail drums, head bearings, tail bearings, scrapper crossings rollers, troughing return rollers and conveyor belts. All of these components, Mr. Fogarty said, turn and move as the material is transferred onto the batch conveyor. From the cross conveyor the material is delivered to the batch conveyor which is much larger than the cross conveyor. This is also fitted with several electric motors and three large GTU drums and associated bearings. The belt mechanism, which is attached to a block weight, moves up and down in order to maintain tension whilst the material is delivered to the holding bin and from there the material is dispatched to the pan mixer using a guillotine type door and a vibrator to ensure that all the weighed material and dust is fully discharged into the pan mixer.

19. The cement is delivered to the site and fed into storage silos under pressure by fitted pipes. The silos which are carried on metal supports are fitted with electrically operated control devices which monitor the amount of cement in each silo, and filters to prevent dust escaping into the atmosphere. When required the cement is conveyed from the silo to a suspended weigh hopper and onwards to the mixing pan by an electrically powered screw mechanism assisted by aeration pads and a vibrator to ensure that the required amount of cement is fully discharged.

20. When the aggregate and cement is delivered into the pan mixer in the requisite quantities water and “admixtures” are introduced at appropriate levels and the mixing process commences. The water is pumped from a holding tank and weighed before being discharged into the pan mixer. The entire delivery procedure and mixing process is controlled electronically by the control room which is located beside the pan mixer in the main high level structure.

21. The pan mixer is a large drum like container fitted with paddles which are electrically operated. The pan mixer is fitted with pneumatic doors at the top and two hydraulically operated discharge doors which delivers the mixed concrete at different settings into loading

hoppers which are also fitted with hydraulic doors to ensure the concrete is discharged gradually by way of a swing away chute into the waiting trucks for onward delivery.

22. The pan mixer is fitted with several high pressure pumps which are used to feed and clean the mixer.

23. In conclusion Mr. Fogarty stated that in his opinion the moving parts element of the entire plant represented approximately 75% of the total cost of the plant.

Mr. Tadhg Donnelly's Evidence

24. Mr. Tadhg Donnelly, MIAVI, of Brian Bagnall and Associates gave valuation evidence in relation to the property concerned. In his evidence Mr. Donnelly contended for a rateable valuation of €83,311.00 calculated as below. Mr. Donnelly said his valuation was being put forward without prejudice to the appellants claim for exemption in accordance with Section 51 and Part 1 of Schedule 5.

Plant cost as of 1998	=	€495,197
Indexed cost to September 05 (agreed)	=	€774,700
Add for control units updated 2005 (agreed)	=	€100,000
Add for new mixer unit 2005 (agreed)	=	€112,000
Total agreed costs for valuation purposes	=	€986,700
Depreciated value		
(Allowing 6% depreciation for 7 years)	=	€639,528
Valuation		
Rateable fixed plant at 20%	=	€127,906
Site under plant (as agreed)	=	€ 75,000
Site Works (as agreed)	=	€ 75,000
Total	=	€1,177,906
Rateable valuation @ 5%	=	€ 58,895
Add for buildings (as agreed)	=	€ 24,416
Total rateable valuation	=	€ 83,311

The depreciation, Mr. Donnelly said, was justified by the fact that the nature of the plant was such that it was subject to heavy wear and tear functional obsolescence in terms of efficiency and compliance with changing environmental standards.

The Respondent's Evidence

25. Mr. Christopher R. Field, BSc, FRICS, MCMI, is a Principal Valuer with the Valuation Office Agency in England with over sixteen years experience in mineral valuation and the valuation of a wide range of mineral and industrial properties, including quarrying and tipping sites, asphalt plants and ready-mix plants in a wide geographic area covering approximately 50% of England and Wales. Mr. Field said he is currently carrying out valuation work and providing valuation advices to the Land and Property Services in Northern Ireland.

26. Mr. Field said he inspected the property concerned on 5th November, 2008 at the request of the Valuation Office and noted that it occupied a large site adjacent to the M50 roundabout at Tallaght. During his visit he was advised that the appellant company had purchased the property in May, 1998 at which time the plant now on the site was installed. In 2005 he said the plant was upgraded by the installation of a new control system and a new higher capacity pan mixing drum. He described the plant as a "wet mix" plant used for the manufacture of cement which was transported from the site by bulk tankers. Mr. Field said he was advised by Mr. Tadhg Donnelly that the civil engineering works such as concrete foundations, aggregate hopper ramp retaining walls and the outfeed pits were constructed by Kilsaran Concrete themselves.

27. Mr. Field said that he was requested by the Valuation Office to determine the percentage of the agreed valuation of the plant i.e. €986,700 as of September, 2005 that was attributable to moving parts and which are not rateable under the relevant provisions of the Valuation Act, 2001.

28. Mr. Field said his opinion was based on the contractors method of valuation which enabled him to calculate the effective replacement cost of the fixed and rateable elements of the plant and then by deduction to arrive at the value of the moving parts and to express them in terms of a percentage of the agreed valuation of €986,700.

29. Mr. Field referred to the fact that the plant was purchased new in 1998 and upgraded in September, 2005 by the installation of a new mixing pan and control unit. From his observation Mr. Field said he considered substantial refurbishment had also taken place in 2005 and in his opinion the plant had been brought up to modern standards and that no allowance for age/obsolescence was appropriate, as at the valuation date of September, 2005.

30. Mr. Field said his valuation was based on the extensive data bank in relation to the costs of similar plants gathered and maintained by the Valuation Office Agency in the United Kingdom. Much of the plants on which the costs are based are manufactured either in Holland or Germany. The cost of the manufactured plant, which comes in prefabricated units ready for final assembly on site is, he said, similar, irrespective of the country of origin, the only variable being the delivery cost.

31. Mr. Field said that the notional purchase price of the plant at September, 2005 for rating purposes was agreed at €986,700. Having regard to the relevant provisions of the Valuation Act – Section 51(5) and Schedule 5(1) he was of the opinion that 84% of the above figure should be attributed to fixed items and 16% to moving parts. Mr. Field said that he had arrived at the above opinion by first valuing the fixed rateable elements of the plant, and provided the Tribunal with a spreadsheet valuation, setting out in comprehensive detail the valuation of each element of the fixed plant, which in total came to €830,065, which figure represents 84% of the agreed value of the plant of €986,700.00 as of September, 2005.

32. On examination Mr. Field said he had valued over 80 units similar to the subject plant and was familiar with how they operated and what they cost to provide. In relation to the aggregate storage bins, Mr. Field said that only two of them could be vibrated, and in his opinion this did not necessarily mean that they were capable of being moved within the meaning of Section 51(5).

33. Under cross-examination Mr. Field said that this was the first valuation he had carried out in this jurisdiction, but said he had carried out similar type valuations in Northern Ireland. Mr Field said he considered the Valuation Office to be an allied office which carried out similar functions in relation to rating matters as did the Valuation Offices in England, Wales and Northern Ireland. Mr. Field said that he had familiarised himself with the relevant statutory provisions of the Valuation Act, 2001 dealing with the valuation of plant and had regard to

them when arriving at his valuation of the plant at the property concerned. Mr. Field said that he had prepared his valuation in compliance with the Guidance Note issued by the Royal Institute of Chartered Surveyors for valuers acting as expert witnesses. In arriving at his stated opinion he was conscious of his responsibilities as an expert witness to the Tribunal and had provided all relevant facts which would have a bearing on his opinion so stated. Mr. Field said that his valuation was based on the premise that the entire plant was refurbished in 2005 the new control unit and mixer unit were installed. When it was put to him that his valuation methodology was flawed, insofar that it made no allowance for depreciation nor took into account the fact that it was seven years old at the valuation date which meant it was half way through its normal life cycle; Mr. Field said this was not the case. In his opinion the plant was in a refurbished state in September, 2005 and could have had at that time a working life of at least twenty years. The fifteen year life cycle proposition was an accounting exercise and did not necessarily reflect the physical state of the plant at any particular point in time. When questioned about what constituted plant which is capable of being moved Mr. Field agreed that it was in essence a matter of judgment and experience but emphasised there was a distinct difference between those elements of the plant which were moving, i.e. the conveyor apparatus and the bins which were vibrated in order to ensure that the material contained in them was fully discharged. In his opinion the bins were not movable plant within the meaning of Section 51(5).

Mr. Noel Rooney

34. Mr. Rooney is a valuer in the Valuation Office and was the officer that carried out the original valuation as part of the valuation programme.

35. In his evidence Mr. Rooney contended for a rateable valuation of €122,000.00 which was to a large degree based upon Mr. Field's evidence in relation to the percentage of plant which was attributable to moving parts. Mr. Rooney's valuation is as set out below:

Plant Valuation			
Purchased May 1998			€495,000
Indexed by Capital cost/construction			
May 98 to Sep 05	148.9/232.9	(Agreed)	€774,717
Upgraded in 2005 with mixer unit		(Agreed)	€112,000
Upgraded in 2005 with a control unit		(Agreed)	€100,000

Estd replacement cost	(Agreed)	€986,717
Allow for moving parts 16%	less	€157,875
Adjusted replacement cost		€828,842
Site works	(Agreed)	€75,000
		€903,842
Fees/levys/planning etc 10%		€90,384
		€994,226
Depreciate @ 2%		€974,341
Site .75acre @ €1,300,000pac. (Agreed)		€975,000
Total replacement cost		€1,949,341
	NAV @ 5%	€97,467
Add buildings	(Agreed)	€24,416
Total NAV		€121,883
Valuation Office Estimate of NAV		€122,000

It should be noted that the valuation put forward by Mr. Rooney is markedly different from the rateable valuation of €150,000.00 currently appearing in the valuation list.

36. In support of his valuation, Mr. Rooney introduced one comparison, details of which are set out in Appendix 1 attached to this judgment. It is noticeable in this comparison that the figure attributable to the moving parts is 30% of the adjusted replacement costs of all the plant as against 16% in this plant as put forward by Mr. Field.

37. As part of his evidence to the Tribunal Mr. Rooney provided a written report prepared by Mr John J. Lauder, MSc, BE Eng, Mgt Dip Eng, Comp DipEnvir Mgt, C Eng, MIEI, in relation to the composition of concrete. Mr. Lauder did not appear at the Tribunal and a copy of his report is attached to this judgment at Appendix 2.

Legal Submissions

Mr. Hickey on behalf of the appellant contended that his case for the exemption of the concrete 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 or 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, BL 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 concrete plant in this appeal is:
Can the concrete 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;

Section 51

(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.

Schedule 5

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 Concrete Plant?

Stage 1 - All materials required for the making of concrete are delivered to the site, i.e. cement etc.

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

- Cement in silos
- Sand/gravel, either in hoppers or on surface
- Water in holding tanks

Stage 3 - Making of Concrete:

Concrete is made by mixing the three main ingredients with water at appropriate levels, depending upon the purpose for which the concrete is required, on demand and the various quantities of each material are called up by the control room and delivered to the mixing drum by appropriate means, i.e. water by pipeline; sand/gravel by conveyor; cement by pipeline are delivered to the drum. Mixing commences by way of an electrically powered

paddle and probably takes about 2/3 minutes. Once mixed the batch is delivered by gravity to the waiting lorry for onward delivery to the customer. The Lorries use mechanically operated drums to prevent concrete from hardening during the course of delivery.

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 subject plants 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 *"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 expert evidence that no physical or chemical change occurs in any of the constituent elements which together make up concrete occurs until such time as they are delivered to the mixing pan where they are mixed in accordance with the appropriate recipe to meet individual customer demands for concrete of specific type and use.

    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 or are used to transport material from one section of the plant to the other in order to facilitate the concrete manufacturing process which takes place in the mixing pan.

Valuation Issue

11. The relevant valuation date for the South Dublin revaluation programme is 30th September, 2005.
12. The valuations put before the Tribunal in relation to the concrete manufacturing facility were each prepared using the contractors method of valuation as provided for under Section 50 of the Valuation Act. In this instance the starting point was the original cost of €495,300 in May, 1998, which figure was indexed by reference to the capital cost/construction index and to the figure thus obtained was added the cost of the new mixer and the control unit installed in 2005, giving an agreed replacement cost of €986,700 as at the relevant valuation date.
13. Mr. Field in arriving at his opinion of the percentage of the agreed figure of €986,700 which constituted moving parts, and hence not rateable prepared a comprehensive spreadsheet valuation of each individual element of the fixed plant and arrived at a figure of €830,065, i.e. circa 84% of the agreed estimated costs as at the valuation date. By deduction therefore the estimated cost of various moving parts was €156,635, or 16% of the agreed estimated cost of €986,700. Mr. Fogarty of MEQS, the company which installed the plant, stated that in his opinion that the percentage to be attributed to the moving parts was 75%. It must be said whilst Mr. Fogarty gave a fulsome description of

the plant and the manufacturing process, he produced no information or analysis as to how or on what basis he arrived at his estimate of 75%.

14. Mr Field's apportionment of the estimated replacement cost between fixed plant and moving parts was arrived at by a process of deduction, rather than by direct assessment. His evidence, in our opinion, would have carried more weight if it had independently assessed the cost of the entire plant and apportioned the figure so determined in percentage terms as between fixed plant and movable plant. Having carried out this exercise the percentage thus arrived at could have been applied to the agreed estimated cost of the plant as at 2005 of €986,700. We have no doubt that Mr. Field has the required competence to carry out this exercise and, had he done so, his evidence would of course have been of more assistance to the Tribunal.
15. We have examined Mr. Field's spreadsheet in great detail and, based on our inspection of the premises, we have come to the conclusion that the storage hoppers, the mixing tower, (with the exception of the mixing pan and control system), cement storage silos and associated supports are items of fixed plant. Similarly, the entire conveyor system is considered to be fixed plant, save for the conveyor belts and all the ancillary components which cause the conveyors to move and which transport the material to the mixing pan where the process of change is initiated and continues for some considerable time after the cement is delivered on site. Making the best judgment we can we have come to the conclusion that the appropriate figure to attribute to the fixed plant to include the electric power requirement is €621,000 or circa 63% of the agreed estimated replacement cost of the entire plant as the relevant valuation date. It is noted that the figure attributed to the non rateable plant is 37%, which is not dissimilar to the 30% figure agreed at the Roadstone plant, as introduced for comparison purposes by Mr. Rooney.
16. The Rating and Valuation Association published a document in 1989 dealing with the contractors basis of valuation for rating purposes, which has been accepted by all those engaged in rating practice and sets down the guidelines for valuing categories of properties which are not normally let on the open market. In accordance with these notes it is standard practice to include design costs and fees in the estimated replacement costs. Accordingly therefore we find Mr. Rooney was correct in providing for such fees/replacement costs in preparing his valuation.
17. Under the guidance note there is no provision for depreciation as such, which is a term more commonly found in accounting practice. However, in rating law the property concerned is to be valued *rebus sic stantibus* as of the relevant valuation date. As the

estimated cost or replacement cost relate to the provisions of a new facility, it follows therefore that some allowance may be necessary to allow for the state or condition of the property at the valuation date to reflect physical, functional, economic, and technical obsolescence. The concrete manufacturing plant at the property concerned was built in 1998 and upgrading took place in 2005, including the addition of a new mixing pan and control unit. The main constructions on the property are original, and due to the nature of the manufacturing process are somewhat basic constructions but nonetheless subject to heavy ongoing wear and tear. In the circumstances there should, in our opinion, be some allowance for obsolescence and in our opinion the appropriate figure is 30% having regard to the age and physical state of the fixed elements of the plant.

Determination

Having regard to the foregoing and taking into account all the evidence and arguments adduced, the rateable valuation of the property concerned is determined to be €100,000 calculated as set out below:

Valuation Plant cost (May 1998)	(as agreed)	€495,300
Indexed to September 2005	(as agreed)	€774,700
Add for 2005 upwards	(as agreed)	€212,000
Agreed estimated replacement costs (2005)		€986,700
Estimated cost of fixed plant	(i.e. 63% of total)	€621,000
Costs of sites works	(as agreed)	€ 75,000
Total replacement costs		€696,000
Add fees/ levies/ planning, etc @ 10%		€ 69,600
Total		€765,600
Allow for deprecation @ 30% say		€535,900
Add for site (as agreed)		€975,000
Total estimate replacement cost (Sept 2005)		€1,510,900
NAV @ 5% (as per Section 50)		€ 75,545
Add for buildings	(as agreed)	€ 24,416
NAV say		€100,000

And the Tribunal so determines.