Appeal No. VA10/5/092

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Happy Family Foods Ltd. **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Property No. 1546319, Restaurant (Drive Thru) at Unit 451, McDonald's Drive Thru, Blanchardstown Shopping Centre, County Dublin

B E F O R E

John O'Donnell - Senior Counsel	**Chairperson**
Damian Wallace - QFA, MIPAV, Valuer	**Member**
James Browne - BL	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 28TH DAY OF FEBRUARY, 2011

By Notice of Appeal dated the 31st day of August, 2010 the appellant appealed against the determination of the Commissioner of Valuation in fixing a valuation of €179,300 on the above described relevant property.

The grounds of Appeal as set out in the Notice of Appeal are:
"Without Prejudice. The valuation is excessive and inequitable having regard to the layout, design and location of the property, its NAV relative to other units."

This appeal proceeded by way of an oral hearing, at the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on 17th day of January, 2011. At the hearing, Mr. Adrian Power-Kelly of Power-Kelly & Co. appeared on behalf of the appellant, Happy Family Foods Limited. Mr. Christopher Hicks, a valuer in the Valuation Office appeared on behalf of the respondent, the Commissioner of Valuation.

Background

At the outset, Mr. Power-Kelly objected to the inclusion by the respondent in his précis of evidence of certain correspondence which appears to have been provided to the Valuation Office headed *"Strictly without prejudice"*. While Mr. Power-Kelly made it clear that this did not, in fact, prejudice his ability to present the appeal, he was concerned at the inclusion of documentation headed *"without prejudice"* in a précis of evidence. By way of response to this preliminary objection, Mr. Hicks observed that the Notice of Appeal filed by the appellant appeared, in part, to be *"without prejudice"* and argued that if the letter complained of was to be excluded, then logically the Notice of Appeal should likewise be excluded. Notably, both parties did not actually object to the documentation headed *"without prejudice"* being considered by the Tribunal, but asked for a ruling in respect of the matters.

Ruling

Parties to a dispute are encouraged, as far as possible, to settle their disputes without recourse to litigation, as a matter of public policy. This is the basis of the rule which deems *"without prejudice"* communications to be privileged. The privilege promotes the settlement of disputes by enabling parties to discuss their dispute and the relative strengths and weaknesses of their case with complete candour, secure in the knowledge that anything said in the course of negotiations cannot be used to their prejudice in the course of proceedings. This public policy is also reinforced by the implied agreement that when parties embark on settlement negotiations on a without prejudice basis, they do so on the understanding that the contents of those discussions will not be used to the prejudice of either party.

The claim that a communication is *"without prejudice"* is a significant claim to make and must not be abused. A claim that communication is without prejudice can only be successfully made where it is established that the communication in question was made:-

(i) In a bona fide attempt to settle a dispute between the parties; and

(ii) With the intention that, if negotiations failed, it could not be disclosed without the consent of the parties.

It is clear that the fact that a communication concerns a dispute between the parties is not of itself sufficient to confer privilege; it must be made in furtherance of the settlement of the dispute; See **O'Flanagan -v- Ray-Ger Limited**, High Court unreported, 28th April 1983 (Costello J).

Although the designation by a party of a communication as *"without prejudice"* is a prima facie indication that the communication is in furtherance of settlement negotiations, use of the words possess no magic properties and will not be regarded as conclusive. A Court will not, therefore, hesitate to go behind the without prejudice label in order to ascertain whether communication actually owes its genesis to an attempt to compromise a dispute. Whatever the parties may stipulate, the rule covers only those communications which are genuinely aimed at settlement to avoid litigation. The propensity of parties to mischaracterise their communications as being without prejudice has been the subject of adverse judicial comment; see **Christie –v- Odeon (Ireland) Limited (1958) 92 ILTR 106** wherein Kingsmill Moore J observed that the use of the phrase *"had become quite indiscriminate in legal correspondence"*; he noted also that *"It would be to close one's eyes to all experience of the way correspondence is conducted between solicitors to suggest that all [material] in the majority of letters so headed have to do with attempts at settlement of the case."*

It is thus abundantly clear that careful attention should be given by the parties before the application of the tag *"without prejudice"*. This Tribunal will not allow parties to use this label in an attempt to cloak from disclosure, or absolve of legal consequence, communications which have little or nothing to do with the settlement of disputes. The Courts have made it clear in the past that the *"without prejudice"* label is not one which can be used indiscriminately so as to immunise an act from its normal consequences where there is no genuine dispute or negotiation (see **Unilever plc -v- Proctor and Gamble [2000] F.S.R. 344**).

The Tribunal wishes to make it clear that it deprecates the indiscriminate and inappropriate use of the phrase *"without prejudice"* in correspondence or in documents submitted by way

of official notices, written submissions or appendices to précis of evidence. The Tribunal is of the view that neither party in this case deployed the *"without prejudice"* phrase in appropriate circumstances. Where without prejudice communications have taken place between the parties in a bona fide attempt at settlement with the intention that if the negotiations failed, such communications would not be disclosed, then such communications should not be included or referred to in oral or written submissions or in précis of evidence or indeed in oral evidence at the Hearing.

The parties may note also that the Courts have indicated that they will not hesitate to look behind the use of the *"without prejudice"* label to see whether or not a communication is, in fact, truly made in the appropriate circumstances to justify such a claim. The Tribunal is of the view that in all but the most exceptional circumstances, the Tribunal is empowered and indeed obliged to consider whether or not a communication is or is not truly one entitled to the benefit of the *"without prejudice"* privilege, if such an issue should arise for determination before the Tribunal. Specifically the Tribunal should, if requested to do so, be able to consider the contents of communications alleged to be without prejudice or otherwise privileged and to express a view on same without having to thereafter recuse itself from hearing any further evidence in relation to the matters in dispute between the parties, unless there are exceptional circumstances which would require the division of the Tribunal to stand down.

In the instant case, the Tribunal has considered documents produced by both sides which have utilised the phrase *"without prejudice"* and has determined that neither party is entitled to the benefit of the *"without prejudice"* privileged advanced by them in each case.

The Appellant's Evidence

On behalf of the appellant, Mr. Adrian Power-Kelly took the oath, adopted his précis and gave evidence. He emphasised that the unit, which is a standalone Drive-thru McDonalds fast food burger restaurant, was on the south side of an unnamed access road to the western periphery of the Blanchardstown Shopping Centre. In his view, the unit was somewhat isolated from other retail units; to the immediate west and south of the subject property are undeveloped fields. The access to the unit was limited for vehicles since it appears they can only enter off one carriageway of the access road. The agreed floor area is 267 sq. metres. Mr. Power-Kelly noted that the rent had been €95,230 per annum in 1997. On review in

October 2002, it was increased to €160,000 per annum and as of October 2007, the current rent is €205,000 per annum. The lease is a full repairing and insuring lease.

Mr. Power-Kelly noted that the Lisney Commercial Property Index for the period of 2005 to 2007 suggested an increase in rent for Dublin shopping centres between September 2005 and December 2007 of approximately 23.96%. On that basis, he felt that the backdated rent for the property as of the valuation date (September 2005) was, in fact, €165,375.

Mr. Power-Kelly noted that the comparators used by the respondent (KFC Drive-thru and Starbucks Drive-thru, both restaurants), although in the Blanchardstown Shopping Centre, were in what he felt were better locations. They both had access from two carriageways and in addition fronted onto significant car parks (with 600 spaces in the case of KFC and 1,600 spaces in the case of Starbucks). He introduced photographs of the KFC and Starbucks properties and showed on a Google map the location of both comparator units as well as the subject unit.

Mr Power-Kelly also drew our attention to other properties in the Blanchardstown Centre, being Xtravision (Unit 452) and Paddy Power Bookmakers (Unit 453). He accepted that these were not Drive-thru restaurants, but noted the relatively low rent per square metre. He drew our attention to another McDonalds property in the Mall in Blanchardstown Shopping Centre (Unit 306) which, although valued at a NAV of €990.00 per sq. metre, had nonetheless a NAV at the valuation date in September 2005 of 26% less than the rent in 2006.

Mr. Power-Kelly also drew our attention to the low value per sq. metre in another restaurant, TGI Fridays in the Centre. He drew our attention to two McDonalds units and a Burger King unit in the South Dublin County Council area. While outside the relevant rating area, he noted that the valuation per square metre range between €574 and €583, which is significantly lower than the valuation contended for by the respondent in respect of the subject property.

On cross-examination, Mr. Power-Kelly accepted that Blanchardstown was more valuable as a shopping centre than Tallaght. He accepted also that there were difficulties with Nutgrove Shopping Centre because of its age and the tenant mix. He said that he had no evidence one way or the other as to whether or not the rentals of €160,000 and €205,000 agreed in 2002

and 2007 in respect of the subject property were other than open market rents. There was some debate between he and Mr. Hicks as to precisely when between 2002 and 2007 the majority of the rental growth occurred, but it was accepted by him that there certainly appears to have been a growth during the period in question. Mr. Power-Kelly did not, however, accept that the largest growth had been between 2003 and 2005. He accepted that the use of indices such as the Commercial Property Index were of limited assistance as an indicator and were certainly not a primary source, and should be treated with caution. He reaffirmed his belief that both KFC and Starbucks were in superior locations, though he accepted that that superior location may be reflected in the fact that both properties appeared to charge higher rents.

The Respondent's Evidence

Mr. Christopher Hicks, for the respondent, took the oath and adopted his précis of evidence. He indicated that he had dealt with the subject property as well as the KFC property. He felt it would be inappropriate to compare the subject unit with other properties in the centre itself as the subject property was some distance from the shopping centre and was more appropriately compared with other outlying units such as KFC and Starbucks, both of which were also free- standing, drive-in/thru restaurants on the periphery of the development in question. He noted that the rent for KFC was €708.50 per sq. metre and the valuation for it was €670.00 per sq. metre. He noted that rent for Starbucks was €856.00 per sq. metre and the valuation was €750.00 per sq. metre. In the case of Starbucks, while he noted that the unit was smaller, any quantum allowance should, in his view, be balanced against the rent, which by October 2008 would already have started to reduce from the figure which such unit would have attracted in September 2005.

In Mr. Hicks' view, the best measure of valuation of the premises was the rent. He noted a combined growth over the five years between 2002 and 2007 of 28%. On that basis, his evidence meant that the appropriate rent as of September 2005, would be €185,000 (in this regard, he corrected his précis). When examining the Commercial Property Index prepared by Lisney, he suggested that, while the rent had almost doubled between 2002 and 2005, between 2005 and 2007 the rate of growth had reduced considerably, though there was still some growth in rent during this period. In his view, it was not tenable to suggest that the NAV contended for by the appellant (€156,000 in September 2005) should be less than the rent fixed in 2002 at €160,000.

Mr. Hicks submitted that it was not appropriate to consider properties from outside the Fingal Rating Authority area and, therefore, did not consider either of the properties from the South Dublin County Council or Dun Laoghaire/Rathdown areas. In this regard, he referred to Section 49 of the Valuation Act, 2001 which suggests that if the value of a relevant property falls to be determined for the purpose of Section 28(4), that determination should be made by reference to the values, as appearing on the valuation list relating to the same rating authority as that property is situate in, other properties comparable to that property.

Mr. Hicks also excluded from his consideration the Paddy Power and Xtravision units, as they were not drive-thru restaurants. While he accepted that TGI Fridays was a restaurant, he contended that it (and indeed the adjoining Starbucks and Dantes units) was but part of a much bigger unit, being the Leisureplex unit, and that it was not appropriate to value these internal units separately. In his view, the valuation of €670 on the subject property, per sq. metre, which was approximately the same as that attributed to KFC, was not unreasonable in all the circumstances.

In cross-examination, Mr. Hicks accepted that the Tribunal had in the past ruled that property indices were of limited assistance as they dealt only with a "basket" of properties in Dublin and elsewhere. He contended that because this was a revaluation, the appropriate method of valuation was primarily rental rather than the tone of the list. In his view, the tone of the list was to some extent relevant given that the rent was €160,000 in 2002 and had risen to €205,000 in 2007. With regard to the McDonalds property in the Mall in Blanchardstown Shopping Centre where the NAV appeared to be some 26% lower than the 2006 rental, Mr. Hicks contended that the property in the Mall was a high-value property with a higher level of growth and was not, in any event, comparable to the subject property. In his view, though the KFC unit had access to a substantial car park, this was not its own car park. On the other hand, the subject unit has its own car park, though with a significantly lower number of spaces. In any event, Mr. Hicks believed that there was no problem in relation to parking for any of the units in question. All of the units are drive-thru units and so the parking is not a problem and, indeed, is largely irrelevant to valuation in the circumstances. He did not believe that there was any difficulty in relation to access to the subject unit premises in general terms.

Both sides made brief closing submissions.

Section 48 of the Act requires that the value of a relevant property be determined by estimating the net annual value of the property. The net annual value means in relation to a property, the rent for which one year with another the property might in its actual state be reasonably expected to be let from year to year.

The Tribunal is of the view that its primary focus in looking at the net annual value of the premises in question is, and should be in these circumstances, the rental value of the unit particularly having regard to the fact that this is a revaluation. The Tribunal cannot and will not ignore the *"tone of the list"*, but tone must be set by properties which are truly *"comparable"* to the subject property.

It appears to us that the properties truly *"comparable"* to the subject property are the KFC and Starbucks units. Both are drive-in/thru restaurants. Both are freestanding. Both are on the periphery of the development the subject matter of this appeal, and in these circumstances, they have much in common with the subject unit. It does not seem appropriate for the Tribunal to compare the subject unit with non-restaurant units such as Paddy Power or Xtravision. The use of comparators in the Mall of the centre itself is also fraught with difficulty, especially having regard to the fact that the rents within the centre are very much higher. The comparators suggested in the Square in Tallaght and Nutgrove Shopping Centre, while drive-in/thru restaurants, are not in the same local authority area and are of no real assistance in circumstances where a Tribunal had readily available comparators (being KFC and Starbucks) not only in the same rating area but in the same locale as the subject unit.

The Tribunal notes the reservation expressed by a previous Division in relation to the usage of commercial property indices in attempting to establish the NAV of a property. The reservations expressed by the Tribunal in the past are, in our view, well-founded. However, it seems to us, in any event, that the figures in the Commercial Property Index for the relevant period corroborate what is abundantly clear from the rental figures produced to us, i.e. that between 2002 and 2007, there was a substantial increase in rent for retail commercial units in the Dublin area including, *inter alia*, units such as the subject unit. While it is difficult to be certain as to whether or not the bulk of that growth took place between 2002 and 2005 or between 2005 and 2007, it does not appear to us unreasonable to suggest that the growth of

5% per annum between late 2002 and late 2005 would suggest that the appropriate rental as of late 2005 would be €195,000 (i.e. 267 sq. metres @ €733.00 per sq. metre). We note also that the KFC unit at rent review in July 2005 suggest a rental of 247 sq. metres at €708.50 per sq. metre which is higher than that proposed by the respondent, though it may be noted that in the valuation of the property of 247 sq. metres at €670 per sq. metre makes a total of €165,490.

The Starbucks unit, while significantly smaller, supports a valuation of 146 sq. metres @ €856.00 per sq. metre. While this is a rental as of October 2008, it is noted that rents by that stage appeared to have begun to drop.

In our view, there is little to distinguish the subject unit from the Starbucks Unit and (especially) the KFC unit in terms of location and access. The access to car parking which KFC and Starbucks have by virtue of the presence of nearby public parking spaces is of negligible, if any, impact particularly having regard to the fact that the subject unit has its own dedicated car park. In the circumstances, it appears to us that the respondent's estimation of the NAV is correct.

Determination

The appropriate NAV for the subject unit as of September 2005 is as follows:

267 sq. metres @ €670.00 per sq. metre = €178,890

NAV Say €179,000

And the Tribunal so determines.