Appeal No. VA96/2/007

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 1988

VALUATION ACT, 1988

All Seasons Flowers Limited **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Shop at Map Ref: Unit 14A, Clondalkin Shopping Centre, ED. Clondalkin - Dunawley (including 5CD Clonburris Great), South Dublin County Council, Co. Dublin
Validity of revision

B E F O R E

Con Guiney	**Barrister (Acting Chairman)**
Patrick Riney	**FSCS.FRICS.MIAVI**
Marie Connellan	**Solicitor**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 30TH DAY OF JANUARY, 1997

By Notice of Appeal dated the 12th April, 1996 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £90.00 on the above described hereditament.

The grounds of appeal as set out in the Notice of Appeal are that "the RV £90.00 is excessive, inequitable and bad in law, having regard to the Valuation Acts and on other grounds also."

The property consists of a shop unit in the Mill Centre, Clondalkin, Dublin 22 with a frontage to the enclosed shopping mall and to the car parking area. The agreed accommodation comprises 555 sq.ft. of net lettable floor area.

The premises are held under a 35 year F.R.I. lease with five yearly reviews from 25th October, 1994 at the initial rent of £17,220 per annum.

The relevant valuation history is that the subject property was inspected and revised in November, 1994 and the valuation list was issued on 9th November, 1994 giving rateable valuation at £90.00. On the 7th December, 1994 agents on behalf of the appellant lodged an appeal against the revised valuation. On 5th December, 1995 a further notice of appeal was lodged by Hennigan & Company as the original first appeal had not been dealt with at that time by the Valuation Office. The premises was inspected by the appeal valuer in December, 1995 and on 25th March, 1996 the Commissioner of Valuation issued his decision leaving the rateable valuation at £90.00.

A written submission by Mr. Joseph Bardon, Dip. Environ. Econ. ARICS ASCS of Hennigan & Company on behalf of the appellant was received by the Tribunal on 29th August, 1996.

In general terms Mr. Bardon's written submission raised three issues.

(a) that the Tribunal had no jurisdiction to hear the appeal as the revised valuation made by the respondent in November, 1994 was not in accordance with law and invalid.

(b) the lot number used by the respondent in the listing of the subject premises was incorrect and should the Tribunal uphold a valuation the lot number should be amended by the Tribunal in accordance with its powers.

(c) without prejudice to the jurisdictional argument the written submission contained grounds for the appeal on quantum fixed, as being excessive and inequitable.

A written submission by Mr. Kevin Heery, B.Comm. MIAVI, a District Valuer with 26 years experience in the Valuation Office on behalf of the respondent was received by the Tribunal

on 26th August, 1996. Mr. Heery's written submission dealt with the issues of the disputed lot number and quantum and referred to the legal issue as to jurisdiction inasmuch as it would be dealt with by Counsel for the respondent at the hearing of the appeal.

In detail Mr. Bardon's written submission as to the jurisdictional issue was as follows. The initial revision request was made by South Dublin County Council on 29th September, 1994 and was forwarded to the respondent by 10th October, 1994. The revision was carried out between the period 10th October, 1994 and 9th November, 1994 and was published in the quarterly revision of 9th November, 1994.

The submission further stated that the respondent had commenced inspections in the immediate district during the week commencing 19th September, 1994 and for South County Dublin in general some time before that.

The written submission continues with a recital of the relevant law on behalf of the appellant. The procedure for commencement of revisions is set out in Section 3, subsections 1, 2, 3 and 7 of the Valuation Act, 1988. The law prior to the Valuation Act, 1988 was contained in Section 4 of the 1854 Valuation (Ireland) Act as amended by Article 37d of the Adaptation of Irish Enactment's Order 1899.

Article 37d provided that the secretary of the County Council could add to the list of properties to be revised, even though that addition had not been included within the time period provided by the Article for the transmission of revision lists to the Commissioner of Valuation, provided that such addition took place before the date at which revision of the valuation of the county had begun. The submission continues that a corollary of this was that the Commissioner of Valuation could not include a request for a revision of a particular property in a county once his inspections for the particular revision period had commenced in that county. The submission further continues that Article 37d is not inconsistent with the provisions of Section 3 of the 1988 Valuation Act and is supplemental to it and therefore not repealed by Section 3, subsection 7 Valuation Act, 1988. The only proviso being that there is

now a quarterly revision period rather than an annual revision and the initiating procedure by the local authority is different.

The written submission contends that the quarterly revision in the present case had begun prior to receipt by the Commissioner of Valuation of the application for inclusion of the subject property in the revision lists. Therefore the respondent should not have included the revision of this property in the quarterly revision being carried out.

On the issue of the lot number the written submission points out that "unit 14A, Clondalkin Shopping Centre" is incorrect, and that the lot number should be "Lot 5D.7 Clonburris Great/Lot 21/1.2 Clondalkin - Unit 14A, Mill Centre". The Tribunal is requested to make the appropriate amendment.

On the quantum issue the written submission contends that the Mill Centre opened on 25th October, 1994. On that date eleven units together with Dunnes Stores were trading and two further units opened shortly thereafter. On the valuation date of 9th November, 1994 the Commissioner of Valuation valued 8 units of 13 which were trading. Additionally on the valuation date 13 units out of a total of 26 were trading. The submission contended that a shopping centre trading at this level could not be described as fully operational. Again the shopping centre because it was not fully operational lacked balance and variety. This meant it was less attractive to shoppers. During 1995 the landlord grew increasingly concerned about the empty units in the centre according to the submission. As a consequence the landlord offered various financial incentives to prospective tenants. The submission cites this as grounds for considering that the original rents were excessive. The submission further states that if the appellant had known the true situation regarding the take up of the units in the centre it would have altered and affected the rent he would have been willing to pay for the unit.

The written submission points that there has been a proliferation of shopping centres in the South County Dublin area. In this area there are approximately ten shopping centres with

Blanchardstown due to open. The submission contended that the shopping centre market must have reached saturation point.

The submission referred to a further number of adverse factors affecting trading at the centre including the following:-

(i) there was no coffee shop in the centre on the valuation date. This is a vital amenity in any centre.

(ii) construction on the site only commenced in August, 1994. This gave rise to a perception in the market that there was no possibility of it being completed by Christmas. Thus tenants and their agents were reluctant to sign leases on the assumption that the centre would not open for Christmas, the most important trading season.

(iii) the letting agents Spain Courtney Doyle were allowed no flexibility in relation to negotiating rents. Therefore in the absence of the usual financial incentives a normal negotiating process did not take place between landlord and tenant.

The submission proposed a fair rateable valuation on the subject unit in a fully trading centre would be £66.00 on the following basis:-

Zone A	360 sq.ft. @ £22.50 psf	=	£ 8,100	
Zone B	195 sq.ft. @ £11.75 psf	=	£ 2,291	
			£10,391	
		Say	£10,400	
			x 0.63%	
			£65.52	
		Say	£66.00	

Mr. Bardon in his submission proposed that an interim valuation of £33.00 should apply for the year 1995, i.e, that a 50% discount be applied to reflect the negative factors outlined in the submission. Furthermore he submitted that as the rateable valuation under appeal arises from the 1994/4 revision and the unit was revalued but remained unchanged at 1995/4

revision this discount could apply for 1995 only with the valuation reverting to £66.00 from 1996 onwards.

Finally Mr. Bardon's submission contained a schedule containing two comparisons.

Mr. Heery's written submission on behalf of the respondent did not accept that a reduced percentage figure on the valuation for one year would be in order. It was his experience that it would not be uncommon for some units in shopping centres to be valued in one year with more units valued in the subsequent year, this process being governed by the state of beneficial occupation as at the operative date.

Mr. Heery in his written submission noted that at a recent inspection all the units in the centre were trading. There is a McDonald's restaurant located in the car park area. The central feature of the centre is the Dunnes Stores supermarket and drapery shop. It consists of 100,000 sq.ft. of ground floor space making it one of the largest Dunnes Stores shops in Ireland. There are in excess of 750 car parking spaces attached to the centre.

The written submission shows that the revised rateable valuation of £90.00 is calculated on an NAV of £14,300 (for November, 1988). This equates to £25.75 per sq.ft. for the agreed area of 555 sq.ft.. The submission contends that this unit, due to its relatively small size, commands a higher rent per sq.ft. than the larger units in the centre.

Mr. Heery's written submission contained the following checks to indicate that an NAV of £14,300 is reasonable.

(1) Consumer Price Index - October, 1994 to November, 1988.
(2) Construction Cost Index - (Society of Chartered Surveyors) 1994 to 1988.
(3) SCS/1PD Irish Property Index, Retail Section - Rental Growth, December, 1994 to December, 1988.

These three indices give NAV's which closely approximate the NAV of £14,300 which is the basis for the rateable valuation of £90.00.

The submission further states that the best evidence of NAV here is the market rent passing and the submission contains a schedule of rents at the centre.

Mr. Heery's submission contains comparative evidence with respect to three units within the Mill Centre. The submission also contains comparative evidence drawn from the Superquinn Shopping Centre, Lucan. The submission makes the further point that for a number of reasons the Mill Centre is superior to the Superquinn Centre, Lucan. The reasons include:-

(a) better location,

(b) much larger anchor tenant,

(c) greater parking space, and

(d) larger number of units trading in the centre.

The hearing of the appeal took place on 6th September, 1996.

Mr. Brian Sherry, Solicitor represented the appellant and Eamonn Marray, B.L instructed by the Chief State Solicitor represented the respondent.

Mr. Bardon in his sworn testimony adopted his written submission as his evidence to the Tribunal. Mr. Bardon dealt further in his evidence with the issue of quantum. The Commissioner of Valuation had only valued 8 units notwithstanding there were 13 trading. This was unfair to the tenants being valued as they were being asked to carry one year's extra rates. Again shopping centres like the Mill Centre and the units therein should not be listed for revision until they had settled down in trading terms. This time lapse would give the Commissioner of Valuation time to make a better evaluation of such shopping centres.

Mr. Bardon said in his evidence that each shopping centre stands on its own merits. Furthermore it was impossible to compare a new centre trading for four weeks with established centres. He contended that the proper approach in the case of Mill Centre was to make a valuation in the normal way and allow a discount to reflect the negative factors.

Under cross examination by Mr. Marry, Mr. Bardon conceded that the appellant had agreed the rent for his unit in advance of the opening but that this rental agreement was on the basis that the centre would be fully operational. Mr. Bardon further stated under cross examination that to the best of his knowledge the appellant did not negotiate the rent downwards when he discovered the true trading situation at the centre. This was because the landlord did not allow any flexibility in the lease terms. Mr. Bardon stated that all 26 units in the centre were now operational. He accepted that the anchor tenant was very large in size. He further accepted that the occupiers of the centre were reasonably satisfied.

Mr. Bardon accepted under cross examination that there was no statutory basis for the type of discount he was seeking with respect to the appellants premises.

Mr. Edward Gaynor the owner of the subject premises gave evidence that he had negotiated the lease on the basis that centre would be 90% operational. He stated that his initial turnover was disappointing and only in October, 1995 was there an improvement. He did not go back to the landlord to re-negotiate the rent. He stated he had been in business for 14 to 15 years and he saw the potential in the premises and he expected it would reach its full potential in 2 to 3 years.

Mr. Cyril Perry, Manager of the Mill Centre since its inception gave evidence on behalf of the appellant. He corroborated Mr. Bardon's evidence as to the negative factors present in the initial trading period. Under cross examination by Mr. Marry he accepted that tenants initially are reluctant to accept that they get good value for their rents. He accepted that by July, 1996 all the units in the centre had been let and that no tenant had left the centre since its inception.

Mr. Heery in his sworn testimony adopted his written submission as his evidence to the Tribunal. In his further evidence he stated that there was sufficient evidence within the Mill Shopping Centre to establish an NAV for the subject premises. Lettings per sq.ft. in the centre are comparable. The subject premises is slightly higher because smaller. He stated that in all his experience he had never encountered the type of discount being sought by the

appellant. There was no statutory basis for this and Section 11 of the Valuation (Ireland) Act 1852 provides that NAV is to be viewed as taking "one year with another".

Mr. Heery accepted that the Mill Shopping Centre was trading better in 1995. He further accepted that Mr. Gaynor had made a loss in 1994, stating that this would be typical in a start up situation. Mr. Heery contended however that the premises in 1995 are comparable to the premises in 1994. In 1994 the potential for development was known to a prospective tenant and the lease was negotiated on that basis.

Mr. Heery accepted that rent was not the sole determinant of NAV but market rent was the best evidence. The Commissioner of Valuation takes into account grounds of reasonableness and fairness in assessing rateable valuation.

Mr. Sherry in his submission on jurisdiction referred to the following cases:-

(1) Buckley v. Finnucane, Vol. 31 Irish Law Times Reports
(2) Texaco v. Murphy 1992 2IR
(3) Rex (McCusker) v. Corporation of Belfast, Vol. 35, Irish Law Times Reports
(4) McCusker v. Commissioner of Valuation, Vol. 36, Irish Law Times Reports.

Cases number 1 and 2 are of general application and are authority for the proposition that rates are in the nature of a penal charge and must be paid when formally struck. The ratepayer's remedy is to attack the legal basis for the making of the rate (Buckley v. Finnucane). Texaco v. Murphy is authority for the proposition that a citizen should not be taxed unless the language of the statute clearly imposes an obligation. In other words taxation statutes should be strictly construed.

The two McCusker cases refer to the making of a rate as provided for by Section 4 of the 1854 Valuation (Ireland) Act as amended by Article 37 of the Local Government (Adaptation of Irish Enactment's) Order 1899.

Section 4 of the 1854 Act provided a mechanism and a time frame for the annual revision of rateable valuations. Article 37 of the Local Government (Adaptation of Irish Enactment's) Order 1899 makes adaptations and modifications as to time and mode of the transmission of revision lists to the Commissioner of Valuation; 37(d) the date by which the revision of hereditaments and tenements are to be transmitted to the Commissioner of Valuation, (37f) the date by which the first revisions are to be completed, 37(n) the first date for the making of a rate. Each of these three events is linked in a casual chronological order in a twelve month period.

Articles 37 (d), 37 (f) and 37 (n) are amended by the Local Financial Year (Adaptation) Order 1984, S.I. No 265 of 1984. This statutory instrument does not alter the yearly cycle but amends the specific dates on which each of three events in the yearly cycle of revising and making the rates occur.

Section 3(1) of the Valuation Act 1988 provides a new mechanism for the continuous revision of rateable valuations inasmuch as an owner or occupier of property can apply at any time for revision to the rating authority. Section 3(2)(b) provides that the rating authority shall submit to the Commissioner of Valuation a list of all applications made in any month within ten days after the end of that month.

Section 3(3) of the 1988 Act obliges the Commissioner of Valuation to determine within six months the applications he has received as aforesaid or as soon as may be thereafter and shall as soon as practicable issue a list of the determinations on a quarterly basis within ten days after the end of that quarter.

Section 3 (7) of the 1988 Act states that Section 3 of the 1988 Act shall have effect notwithstanding anything to the contrary in the Valuation Acts.

Mr. Marray in his submission on the jurisdiction issue, as raised by Mr. Bardon's submission, namely that there is now a quarterly revision period, is that this is directly contrary to the express wording of 3(1) of the 1988 Act. Section 3(7) of the 1988 Act makes it explicit that

the Oireachtas had provided a fresh procedure for the revision of properties. This involved the abolition of annual revision and substituting continuous revision. Mr. Marray submitted that the key defect in the submission made on behalf of the appellant is that the operation of Section 3(3) of the 1988 Act acts to create a quarterly revision rather than an annual revision and thus allows Article 37(d) of the Local Government (Adaptations of Irish Enactment's) Order 1899 to operate. In Mr. Marray's submission what Section 3(3) of the 1988 Act provides is a quarterly listing of determinations of the Commissioner of Valuation.

The Tribunal finds that Mr. Marray is correct in this submission and the process of continuous revision as provided for in the 1988 Act has been properly complied with. Furthermore the Tribunal finds that the case of Rex (McCusker) v. Corporation of Belfast does not apply to an annual revision under Section 4 of the 1854 Valuation (Ireland) Act but to a general revision under Section 65 of the Local Government (Ireland) Act 1898 and so cannot aid the appellant here. Incidentally the lacuna in the law created by this McCusker case was rectified by the Valuation (Ireland) Act 1901.

Again the case of McCusker v. Commissioner of Valuation dealt with the provision in Section 4 of the Valuation (Ireland) Act 1854 as to whether the omission of the secretary of the County Council to submit the list of tenements for revision to his council for their opinion, or his omission to forward their opinion with the lists to the Commissioner of Valuation does in any way affect the revision or the validity of the rate. It was held that the requirement was merely directory and not mandatory and therefore the validity of the rate was not effected. Therefore this case is of no assistance to the appellant.

Therefore the Tribunal finds that it has jurisdiction to deal with this appeal.

Mr. Sherry in his submission about the lot number stated that the appellant would not be prejudiced by a failure to amend. It was submitted on behalf of the respondent that the existing lot was useful in the implementation of the computer system in the Valuation Office.

The Tribunal therefore determines that the balance of advantage between the parties lies in leaving the lot number unchanged.

As to the issue of quantum Mr. Sherry submitted that the Tribunal should be guided by its decision in Xtra-vision v. Commissioner of Valuation (VA91/3/019) and should act reasonably and equitably and not try to achieve the uniformity which is the apparent aim of Section 5(1) and (2) of the Valuation Act, 1986 by the use of artificial formulas.

Mr. Marray's submission on quantum was that there was an obligation to determine the true rateable valuation of the subject premises. The true indicator of this was the rental value of the hereditament which had been agreed.

The Tribunal finds that the most appropriate comparison is one taken within the Mill Centre. The Tribunal further finds that some weight must be attached to the effect that the adverse factors in the start up of the subject premises would have on the hypothetical tenant.

Accordingly the Tribunal finds that the most appropriate comparison in the Mill Centre is L & J. Fashions. This premises of 587 sq.ft. is similar in size to the subject premises and at a yearly rent of £12,500 devalues at £21.29 per sq.ft..

The Tribunal therefore finds:-

555 sq.ft.	@	£21.29psf	=	£11,815.95 NAV
				X 0.63%
		RV	=	£74.44
		Say	=	£74.00

The Tribunal therefore determines the rateable valuation of the subject premises to be £74.00.