Appeal No. VA96/4/018

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 1988

VALUATION ACT, 1988

Moyglare Holdings Limited **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Stores at Map Ref: 17B, Alexandra Road, Ward: North Dock B, County Borough of Dublin

Quantum - Description, Lease/restrictive covenent, EU Grant, Value of Central access area

B E F O R E

Liam McKechnie - Senior Counsel **Chairman**

Fred Devlin - FRICS.ACI Arb. **Deputy Chairman**

Barry Smyth - FRICS.FSCS **Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 14TH DAY OF OCTOBER, 1997

1. By Notice of Appeal dated the 21st day of August, 1996 the Appellant Company, Moyglare Holdings Limited, appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £1,870 on the above described hereditament.

The grounds of appeal, as set out in the said Notice are:-

"**(1)** The valuation is excessive and inequitable.

(2) The valuation is bad in law."

These grounds in reality amount only to a challenge on the question of quantum with no issue being raised as to the rateability of this hereditament.

2. This appeal proceeded by way of an oral hearing which took place in Dublin on the 23rd day of May, 1997 and the 16th day of June, 1997. Both parties were represented by Solicitor and Counsel. On behalf of the Appellant Mr. Desmond Killen, FRICS, FSCS, IRRV, a Fellow of the Society of Chartered Surveyors and a Director of Donal O'Buachalla & Company Limited gave evidence as did Mr. Ronan Fitzpatrick, the Managing Director of Moyglare Holdings Limited. Mr. David Walsh, B.Agr.Sc, a District Valuer gave evidence on behalf of the Commissioner. Having taken the oath both Valuers adopted as their evidence in chief their respective précis of evidence which previously, in accordance with practice, had been exchanged between them and submitted to this Tribunal. Mr. Fitzpatrick's evidence was likewise on oath and supplemented with documentation. Arising, from the evidence so tendered and the submissions so made the points at issue between the parties can conveniently be dealt with as follows:-

3. **Description of Hereditament:-**

The property in this case which constitutes the rateable hereditament, is located immediately adjacent to Alexandra Road and has a direct entrance from No. 3, Branch Road South, all within that part of Dublin which is under the control of the Dublin Port and Docks Board. This said property, the erection of which was completed in or about the year 1993, is comprised of a large building with an internal access area. This area is variously described as a marshalling area, as a circulation area or simply as a central access area. At either side of this area which runs in an east/west direction the building is sub-divided by internal partitions of a non structural and non permanent nature. This results in 8 smaller areas which for descriptive purposes are referred to as bins. There are four such bins to the North being Bin Numbers 1 to 4 and four to the South being Bin Numbers 5 to 8. These are used to house certain products, the nature of which are hereinafter referred to, with the central area being used for the purposes of accessing these bins.

4. The building itself, which is purpose built, is steel framed with re-inforced concrete

walls to a height of 5m. It has double skin insulated walls for a further 1.5m to eave; and it has a re-inforced concrete floor with an insulated roof. A ventilation system is in place and the premises has a mixture of natural and artificial light. In addition, it has a two storey office block with a 60ft 60 ton weigh bridge which is situated in a yard which itself measures approximately 26m by 75m.

5. The areas of the rateable hereditament, as found by this Tribunal, are as follows:-

(a) Building containing Bin Numbers 1 to 4: 61,748 sq.ft. which includes a central access area of 20,720 sq.ft.

(b) Building containing Bin Numbers 5 to 8: 56,267 sq.ft. which includes a central access area of 19,456 sq.ft.

(c) Two storey office and reception building: 2,090 sq.ft.

(d) Weigh pit for 60 ton weigh bridge: 737 sq.ft.

The total area of the bin numbers is therefore 118,015 sq.ft., which includes a total access area of 40,176 sq.ft.

6. The first point at issue in this case is whether or not the subject hereditament is correctly described as 'a multi-purpose handling facility', as alleged by the Appellant or simply 'a store' as alleged by the Commissioner.

Sometimes a building can be correctly described by reference to its nature and construction, sometimes by reference to its use. Sometimes however neither its nature nor construction nor indeed its use can safely be relied upon as affording to a particular premises a description which, in the legal or valuation sense, is correct. Though the views of the respective parties are of importance such views can rarely if ever be conclusive. This because a resolution of the problem must be made not on subjective considerations but on objective criteria, reasonably based.

7. From a valuation point of view it is of much more importance to know, what type and kind of structure is involved and the use to which it is put, rather than simply to have a

description applied however helpful that may be. Whilst accuracy of description is desirable and should be strived for, nevertheless, rateable valuations are fixed not on description but on content and substance.

8. In this case we know that prior to the construction of this building there was, apparently, a lack of facilities within the Port of Dublin to cater for large ocean going vessels and in particular vessels which had, as their cargo agricultural and other products in bulk form. It was to fill this void that these premises were built. What happens now is that when such a vessel docks in the port area its cargo is unloaded by the Appellant Company. Ideally that Company would like its customer to be immediately available and to remove the discharged cargo to the customers premises. That, of course, is quite impossible in a great number of instances. What happens therefore is that the cargo is taken to the subject property and stored in any one of the various bins above described. About 5,000 tons per day is dealt with in this way. The quicker the product is collected by the customer the greater the turnover and hence the more profit for the Company. A charge is made for handling and storing the product. It is either 35p or 32.5p per ton per week or part thereof. This it is alleged includes 'a penalty' for storing the product. No differentiation however is made within this price for pure handling and for storage no matter how long its duration.

In any event what is quite clear to us is that the Company would have a strong preference for the immediate transport on of the unloaded bulk cargo if that were feasible but, for a variety of practical reasons, this is not possible. Hence, it is absolutely crucial to the Company's operation to have available storage facilities for this cargo. Whether one describes the building as a store, or as a transit store, or as a multi-purpose handling facility is, in our view, almost irrelevant. What one looks at and considers is the structure and condition of the building and the activity which takes place therein, not the name tag ascribed or suggested.

9. **<u>Leases/Restrictive Covenants:-</u>**

The Appellant Company holds the above described hereditament under two Leases dated respectively the 12th day of August, 1992 and the 27th day of January, 1994. The Lessor, under both Leases, is the Dublin Port and Docks Board. The August,

1992 Lease, sets out in the First Schedule thereto, what the Demised Premises are (containing 0.8 hectares or there about), confirms that the term is for 99 years from the 1st June, 1992, that it has a reserved rent of £18,000 p.a. with five yearly reviews and that the letting is subject to the other terms and conditions therein contained. The 1994 Lease likewise, sets out in the First Schedule a description of the Demised Premises (containing 0.74 hectares or there about), states that the term is for 98 years from the 1st June, 1993, that it has a reserved rent of £16,400 p.a. subject to five yearly reviews and that this letting is also subject to the other terms and conditions therein contained. These 'other terms and conditions', are almost identical in both Leases.

10. It is alleged on behalf of the Company that many of these 'other terms and conditions' are in truth restrictive covenants which are statutory in origin and which accordingly, must be taken into account when one assesses the NAV and hence the RV of the subject property. On behalf of the Commissioner it is claimed that if these are restrictive covenants then the same form part of a private arrangement between the parties and must, in their entirety, be disregarded for the purposes of this appeal.

11. The law on this matter is reasonably clear and certain. The statement, by Lord Buckmaster, in the ***Port of London Authority v. Orsett Union [1920] AC 273*** is still considered as the classical authority on this point. At p305 Lord Buckmaster said:-

> *"The actual hereditament of which the hypothetical tenant is to be determined must be the particular hereditament as it stands, with all its privileges, opportunities, and disabilities created or imposed either by its natural position or by the artificial conditions of an Act of Parliament".*

Whilst that statement was in relation to the affect of a statutory restriction upon profits, nevertheless it lays down a principle which equally applies to all hereditaments.

At ***paragraph E (261) of Ryde on Rating and The Council Tax*** the author says:-

"It follows from the Rule that the hereditament is at the date of valuation deemed to be vacant and to let on the statutory terms that restrictive covenants and other private arrangements affecting a hereditament are irrelevant in the ascertainment of its value for rating. On the other hand every potential hypothetical tenant must be affected by statutory powers or obligations which are attached to the hereditament in who ever's hands it may be".

See also ***paragraph 110 of Halsbury, Laws of England, 4th Edition*** where the following is stated:-

"The hereditament must be valued subject to any statutory restrictions in respect of it, other than those limiting the rent obtainable for it. However restrictive covenants and other private arrangements affecting the hereditaments are irrelevant".

12. In this case the statutory provisions relied upon are those contained in the Harbours Act, 1946 and in particular Sections 50, 55 and 157 thereof.

Section 50 confers on a Harbour Authority the power to provide in connection with their harbour, sheds, transit sheds, trans-shipment sheds, silos, stores and other structures. Section 55 is also an empowering Section where under, a Harbour Authority, may appropriate any part of its harbour to the exclusive use of any person.

We do not see in either of these Sections any obligation in mandatory form which compels a Harbour Authority to impose a specific covenant in any Lease which it might enter into with a user of its facilities. Consequently these provisions are not relevant for the purposes of this case.

13. Section 157 however is. That reads:-

"157- (1) A Harbour Authority may lease any of their lands or premises

for any period not exceeding 200 years, but no such lease shall be made for a period exceeding 10 years without the consent of the Minister.

(2) A lease made under this section by a Harbour Authority shall, without prejudice to the inclusion therein of any other provisions, provide -

(a) that if at any time the Harbour Authority require the land or premises comprised in the lease for the improvement of their harbour, they shall, upon payment of such be fixed by an Arbitrator, be entitled to obtain possession thereof in like manner as if the term of the lease had expired;

(b) that at any time the Harbour Authority are satisfied that the lands or premises comprised in the lease are not being put to some bona fide use, they shall be entitled to obtain possession thereof in like manner as if the term of the lease had expired".

14. As can be seen from this Section, there is at least *prima facia* by the use of the word 'shall', an obligation on a Harbour Authority to include within any Lease made by it of facilities within its jurisdiction, a covenant of the type and kind provided for in *subsection 2(a)* and *(b)* above. In our view this is clearly an example of the 'artificial conditions' mentioned by Lord Buckmaster in the *Orsett Union* case referred to at paragraph 10 above. Therefore these provisions must be taken into account in assessing the NAV.

15. In considering the Leases, reference has been made to Clauses 24, 36 and 37 thereof.

Clause 24 deals with the 'user clause' by reference to the Fourth Schedule. That schedule specifies that the demised premises may be used for 'the storage and distribution of fertiliser, foodstuffs, cement, silica, clinker and other bulk or bagged

products imported or exported through the Port of Dublin'. Clause 36 gives effect to the provision contained in Section 157(2)(a) above recited, but in more elaborate form, in that where compensation cannot be agreed, arbitration provisions are provided for. Clause 37 is a direct incorporation of the provisions of sub-paragraph 2(b) above. We cannot however find any provision within the 1946 Act which specifically imposes an obligation on the Lessor to restrict the use of any premises within its area solely to products being imported or exported through the Port of Dublin. In our view therefore a distinction must be made between Clause 24 on the one hand and Clauses 36 and 37 on the other.

We have no doubt whatsoever but that the Clauses last mentioned must be taken into account by us in assessing the net annual value. These Clauses are not freely negotiable between the parties. They must be imposed by the Landlord. To accept a letting they must be agreed to by the Lessee. He has no choice. Consequently both are statutory based.

16. This is not the position however with Clause 24. It therefore must be treated differently to Clauses 36 and 37. That does not mean to say however that it must be disregarded. An informed tenant in our view would be aware that the Dublin Port and Docks Board is a Harbour Authority for the purposes of the 1946 Act and that the location of the demised premises is within the area of Dublin Port. He would or ought to know that, as a matter of probability, the use to which any premises owned by Dublin Port and Docks Board and located within the port, could be put to, would be Port related. He would not however in our opinion be expected to know that it would be restricted solely to Port related activity. In this way therefore we believe that because of the location of the demised premises and the statutory persona of the Landlord this restriction in user is also a factor which we should take into account in assessing the NAV.

17. **<u>Central Access Area:-</u>**

At least as originally presented this Tribunal felt that an argument was being advanced on behalf of the Appellant Company that the total of the circulation area

in all measuring about 40,176 sq.ft. should not be rated. This, because firstly that area was roofed solely for environmental purposes and not out of any other statutory or legislative requirement and secondly, because it did not provide and was not being used for any handling/storage use. In Counsels' written submissions, for which we are grateful, the position has been clarified. It is now being asserted that at no time was such a submission made or intended and that the true position is that the value of this area should be subsumed into the valuation of the building proper. As so clarified we accept this submission. In our view it would have been quite impossible to hold that the Appellant Company was not in beneficial occupation of this area or that in fact it was incapable of such beneficial occupation. There is no doubt but that this area is an integral part of the overall operation and activity being conducted within this building. It is absolutely vital to such activity that vehicles can deliver and collect. It would not be possible to operate without this. Whilst therefore it is true to say that the area is more valuable when covered nevertheless this Tribunal must take the property *rebus sic stantibus*. Consequently it must have a value. Whether a separate valuation is placed on it or whether it is subsumed within an overall valuation is one of appropriateness. In this case it should be subsumed.

18. **<u>EU Grant:-</u>**

Evidence was adduced before us to the effect that the capital expenditure required for the construction of this property was, as to 50% thereof, EU grant related. This grant however was subject to certain terms and conditions and in particular those set forth in a letter, addressed to Mr. Fitzpatrick from the Department of the Marine dated 16th October, 1992. In essence this facility was being made available to the public at large and was designed to help increase the traffic flow through the Port of Dublin. To that end the Company, in return for this grant, was obliged to reduce its handling charges from £6.50 approximately to £3.85 and to hold these charges for a period of time. Furthermore the benefit of this reduction had to be passed on to the ultimate consumer and compliance with this requirement was enforced or enforceable by way of an audit procedure. Considerable debate took place between the parties as to what affect if any should be given to the above facts in ascertaining the NAV.

On behalf of the Company it was alleged that the same should not have the effect of increasing the NAV, that in accordance with *Section 11 of the 1852 Act* the correct basis of approach should be to ascertain what the tenant should be expected to pay and not what a Landlord would be expected to look for, that profit earning ability is a basic element in determining the NAV and that despite some inconclusiveness as to how long the reduced charges should hold, the task before this Tribunal was to look at the rent one year with another. On behalf of the Commissioner it was claimed that since the grant, the reduced port handling charges and the discharge costs were all factors extraneous to the relationship of Landlord and Tenant these should in their entirety be disregarded.

19. In our view what is required of this Tribunal is to ascertain the net annual value in accordance with, *inter alia, Section 11 of the 1852 Act*. In general that means we must take the premises in their actual state and condition and must estimate what the hypothetical tenant would pay therefore, as rent, taking one year with another. We are not concerned, at least directly, with the motives of the Appellant Company in embarking upon this project or in the suggestion that this project would never have been undertaken without such a grant. Equally so, we are not concerned with the source of the funding. Nor are we concerned in any determinable way with the actual charges being applied by the Company. If however these were matters which we should take into account it would have been our view that the Appellant Company is certainly at no loss and probably at some advantage in that the reduction in charges is off set by the 50% grant, which grant was payable not later than the completion of the building and thus accrued to the Company considerable saving in the cost of funding.

20. **<u>Method of Calculation:-</u>**

We are quite satisfied that it is entirely possible to calculate the appropriate NAV by placing a rate psf on the areas contained within the subject property. It is not in our view either desirable or necessary to use a tonnage basis or a capital value/return on investment basis.

21. On behalf of the Commissioner it is suggested that a rate of £3 psf should be placed on the entire of the covered area. On behalf of the Appellant Company, Mr. Killen suggests that the office and weigh pit should have a combined NAV of £7,270 which we propose to accept. In relation to the balance however Mr. Killen's estimate of NAV is £116,878 which devalues at £1.50 psf on 77,919 sq.ft. thereof. If one were to take the entire area as 118,069 sq.ft. that suggested NAV would devalue at 99p psf. That in our view, on any reading of the evidence, would be quite unsustainable.

22. The comparative evidence adduced was of limited value. There is in our opinion considerable difficulty in trying to deduce any worthwhile evidence from either the warehouse occupied by R. & H. Hall or the premises of Unigrain International Limited both located at Ringaskiddy in the County of Cork. As is evident the location is different, the size of the premises is different, the nature of the construction is dissimilar and other distinguishing features might include different port relations between Dublin and Ringaskiddy and the different fraction used in converting the NAV to the RV. In the result taking the premises as they are we believe that for the area of 118,069 sq.ft. there should be placed thereon a rate of £2 psf which gives £236,138 added to that for the office and weigh pit should be £7,270 this gives a total NAV of £243,408 with a resulting RV of £1,533.47, say £1,530.

23. In conclusion we determine that the correct RV is £1,530.