

Appeal No. VA99/4/004

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 1988
VALUATION ACT, 1988

Ms. Helen O'Donnell (The Hunt Museum Ltd.,)

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Restaurant/cafe at Map Reference 19b Rutland Street, Townland: Sundry Townlands,
Ward: Custom House, UD: Custom House and Shannon, County Borough of Limerick.

B E F O R E

Con Guiney - Barrister at Law

Deputy Chairman

John Kerr - MIAVI

Member

Finian Brannigan - Solicitor

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 2ND DAY OF OCTOBER, 2000

By Notice of Appeal dated the 11th day of October 1999, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £55 on the above described hereditament.

The Grounds of Appeal as set out in the said Notice of Appeal are that:

- "1. The rateable valuation as assessed is excessive, inequitable and bad in law.
2. The property should be exempt from rates as it forms part of the Hunt Museum which has already been exempted by the Commissioner".

The relevant valuation history is that in November 1998 the valuation list was issued and an R.V. of £55 was assessed on the subject property. In September 1999 the Commissioner of Valuation issued his decision on appeal. The property was held to be rateable and the R.V. at £55 remained unchanged.

A written submission prepared by Mr. Frank O'Donnell B.Agr.Sc, FIAVI, MIREF on behalf of the appellant was received by the Tribunal on 15th May 2000. Mr. O'Donnell is a former District Valuer in the Valuation Office who has over thirty years experience in the practice of valuation.

The written submission raised two issues (a) rateability and (b) quantum.

As to the former it was submitted that the licensee, Helen O'Donnell, does not have exclusive use of the property and as such does not hold a rateable interest in the property. The written submission stated that the property should be correctly rated to the "Hunt Museum Limited".

The submission calculated that a fair rateable valuation would be £43.

The basis for this calculation together with only one comparison was set out in the written submission as follows:

Calculation of N.A.V. / R.V.

1.	Details	Area (sq. ft.)	Rate (sq. ft.)	N.A.V.
	Basement Restaurant	1,560	£4.00	£6,240
	Kitchen	188	£3.00	<u>£ 564</u>
				£6,804
			R.V. @ 0.63%	£42.86
			Say	£43.00

2.	Licence Fee @ 14/02/97	£10,000
	Adjust to November 1988 say 30%	£ 7,000
	(per Jones Lang LaSalle Index)	
	R.V. @ 0.63%	£44.00

Comparison

Dolmen Restaurant

Lot 3. – 6/7, Horans Quay, 1994 Revision

Valuation of £60 agreed as follows:

1.	Rent as at 15/11/93	£10,000
	Adjust to November 1988 say:	£9,524
	R.V. @ 0.63%	£ 60
2.	Total area 3,842 sq. ft. @ £2.50 = N.A.V.	£ 9,605
	R.V. @ 0.63%	£ 60

This was a first floor restaurant and Art Gallery with own separate access from street. The occupier had exclusive use.

Lease Details:

35 year lease from 15/11/93 with rent review every five years.

A written submission prepared by Mr. Brian O’Flynn on behalf of the respondent was received by the Tribunal on 11th May 2000. Mr. O’Flynn is a District Valuer with twenty-five years experience in the Valuation Office.

The written submission set out the basis for the rateable valuation as follows:

Valuation

Restaurant	1,403 sq. ft. @ £6.00psf	=	£8,418
Kitchen/stores	212 sq. ft. @ £2.00psf	=	<u>£ 414</u>
	N.A.V.	=	£8,832
	@ 0.63%	=	£55.64
	Say	=	£55 R.V.

OR

Rental Basis:

February 1997 -	£10,000 x 134.8/166.7 (C.P.I.)	=	£8,806
February 1998 -	£10,500 x 134.8/169.5 (C.P.I.)	=	£8,350
February 1999 -	£12,000 x 134.8/172.2 (C.P.I.)	=	£9,393
	Average of indexed rents @ November '88	=	£8,609
	N.A.V. £8,609 @ 0.63%	=	£54.23
	Say	=	£55 R.V.

Mr. O'Flynn's written submission contained four comparisons. Details of these comparisons are annexed to this judgment at **Appendix A**.

The written submission of both the appellant and the respondent contained a copy of the license agreement made between the "Hunt Museum Limited" (Licensor) and Ms. Helen O'Donnell

(Licensee) and dated the 24th March 1998. The oral hearing took place at the Limerick City Council chamber at Limerick Corporation, City Hall, Limerick, on 25th May 2000. Mr. Owen Hickey B.L., instructed by Ms. Anne Punch of David Punch & Co. Solicitors represented the appellant. Ms. Catherine Griffin B.L. instructed by the Chief State Solicitor represented the Respondent.

Mr. Frank O'Donnell gave sworn testimony on behalf of the Respondent. He adopted his written submission as his evidence to the Tribunal. There was a slight discrepancy between the floor areas of the subject as calculated by the appellant and the respondent. Mr. O'Donnell accepted the areas advanced by the Respondent. This led Mr. O'Donnell to re-calculate his figure for the rateable valuation of the subject at £39.

In continuing testimony Mr. O'Donnell described his comparison. Ms. O'Donnell was the lessee. The property was a first floor art gallery and restaurant. It had separate access from the street. The lessee had free access to the premises by day or night.

Mr. O'Donnell said he had put a higher rate on the subject relative to his comparison because the former was a more modern building and had been refurbished about three years ago. The subject was also a smaller building so he made a quantum allowance.

Mr. O'Donnell said he had used the Jones Lang LaSalle index to adjust the license fee to 1988 because it was a property-based index. On the other hand he considered the C.P.I. index, which was not related to the rental values for property to be unreliable.

In further testimony Mr. O'Donnell commented on the respondent's comparisons. Comparisons number one and two were in the same building. Access to both was at street level. Again both comparisons were located in a designated area for tax relief.

The Respondent's number three comparison was in a busy shopping centre. This property was also located in an area designated for tax relief.

Mr. O'Donnell then dealt with institutional catering arrangements which were listed in his written submission.

At Caryfort College (U.C.D.), catering was done by Leavy's Catering for two years under a licensing agreement. The college restaurant was exempt from the payment of rates.

Fitzers did the catering at the National Gallery which is exempt from the payment of rates. A representative of Fitzers had told Mr. O'Donnell that wherever they operated as caterers they did not pay rates.

Cambell Catering provided a catering service at U.C.C. and the Limerick Institute of Technology. The buildings concerned at both institutions were exempt from the payment of rates.

Under cross-examination by Ms. Griffin, Mr. O'Donnell agreed that office space at Plassey Technological Park on the outskirts of the city devalued at £4psf. He added, however, that this was a desirable site.

Under further cross-examination, Mr. O'Donnell was unable to say whether any Limerick properties were included in the Jones Lang LaSalle Index.

In a further reply Mr. O'Donnell said that the absence of the use of a reducing index in his comparison was due to the fact that adjustments to 1988 were agreed with the Valuation Office.

Ms. Helen O'Donnell gave sworn testimony. She said she was the licensee at the subject property.

In her testimony Ms. O'Donnell described her access to the subject property. On weekdays she is admitted at the front door of the Hunt Museum by the security staff of the Museum at 8.50 a.m. The security staff then unlock the restaurant and finally they unlock the kitchen.

At the end of the trading day, the staff at the subject property must exit the premises at 5.50 p.m. The security personnel ensure that Ms. O'Donnell and her staff have vacated the premises. The security staff then turn off the lights, lock up the kitchen and the doors to the restaurant.

Ms. O'Donnell said her trading hours, Monday to Saturday were from 10 a.m. to 5 p.m. On Sunday the hours were 2 p.m. to 5 p.m.

In continuing testimony Ms. O'Donnell described the use of the restaurant outside normal trading hours. A group called Docents and also the Friends of the Hunt Museum used the premises. These groups meet in the restaurant during the winter about twice a week. Since May of this year they meet once a month. Again seminars were held on the premises. These groups borrow the appellant's glasses and plates. Additionally the Friends do their own catering by providing wine and finger food.

In continuing evidence Ms. O'Donnell referred to paragraph two of the licence agreement which described the catering to be done on a self-service basis. She has however been required frequently by the museum to give table service to the directors of the Museum and groups they invite to lunch. This has been disruptive to the running of her business.

Ms. O'Donnell said the Museum had requested her to open on Saturday and Sunday for a weekend antique fair. This opening was outside normal trading hours. The Museum did not give her two weeks notice for this event as required by paragraph two of the licence agreement.

With reference to paragraph five of the licence agreement, Ms. O'Donnell said she only paid the gas charges. She did not control the heating in the restaurant. In further testimony Ms. O'Donnell said the management of the Museum intervenes frequently in the running of the restaurant. They go into the kitchen and behind the counter. As an instance of the intervention of the Museum's management Ms. O'Donnell described their response to a complaint about queuing in the Restaurant. A person from the management told the chef that he could close down the restaurant in the morning if he was unhappy about any aspect.

In continuing evidence, Ms. O'Donnell said the Museum took the initiative in establishing the restaurant and it owns the premises. The Museum got planning permission for the subject premises and it also refurbished the premises. Again the licensor sees the Restaurant as a benefit to it.

Finally Ms. O'Donnell said the Museum controls the security and the physical area of the restaurant. She said that what she controlled was the food and the catering.

Under cross-examination by Ms. Griffin Ms. O'Donnell said that she did extra catering at the Museum outside normal working hours. She was paid for this sometimes on a profit basis and sometimes at cost.

Under further cross-examination Ms. O'Donnell said that in addition to the licence fee she paid a service charge of £40. This charge covered cleaning of the bathroom and public areas outside the restaurant. A small portion of the charge went towards heating costs. Ms. O'Donnell said that the licensor had painted the restaurant up to this year. The management of the Museum however this year asked her to pay for the painting of the restaurant. In a further reply Ms. O'Donnell said she was responsible for the fit out of the restaurant. The cost of equipment for the kitchen and tables and chairs for the restaurant had cost her a sum between £60,000 and £70,000.

Under cross-examination by Ms. Griffin Ms. O'Donnell accepted she had a right to prevent the management of the Museum from interfering in the running of the restaurant as provided in the licence agreement.

She added that on a day to day basis it was difficult to insist on the letter of the agreement.

In further replies, Ms. O'Donnell said no other catering firm had access to the restaurant. Recently the manager of the Hunt Museum asked her to provide quotations for catering to Shannon Heritage. In the course of the conversation the manager told her he would be seeking quotations from other catering firms.

Finally, under cross-examination, Ms. O'Donnell said the rent for the restaurant was an open market rent.

Mr. O'Flynn gave sworn testimony on behalf of the respondent. He put in evidence two photographs of the interior of the subject premises. Mr. O'Flynn adopted his written submission as his evidence to the Tribunal.

In continuing testimony Mr. O'Flynn described the subject premises. It comprised a dining room, kitchen/wash up area and access to toilets on the lower ground floor of the Hunt Museum. The premises were attractively fitted out and there was a pleasant view over the gardens of the Museum and on to the adjoining river.

Mr. O'Flynn said the entrance to the restaurant was shared with the entrance to the Museum. To enter the restaurant, one descended eight to nine steps from the ground floor of the museum. There was good parking for cars close to the Museum.

In further testimony Mr. O'Flynn dealt with his valuation of the subject. He said that his rate psf was modest. It was comparable to the rate for first floor offices outside the prime shopping area in Limerick. He said he based his valuation on his experience as a valuer in Limerick.

Mr. O'Flynn said his use of the CPI index was equally useful in bringing the valuation back to 1988 as the Jones Lang LaSalle index. The latter index related to prime property and does not necessarily relate to properties in limerick.

Mr. O'Flynn dealt with his comparisons. They were chosen on the basis of proximity to the subject and on the basis of the passing rent being available.

Mr. O'Flynn said he had included the Dolmen restaurant as a comparison to show how NAV was related to the rent passing in 1993. This showed a lesser reduction to 1988 to that shown in the Jones Lang LaSalle index for the same period.

Mr. O’Flynn in continuing testimony said the Dolmen restaurant was not really comparable to the subject. It was a restaurant and Art Gallery. Again it was a first floor premises and no car parking was allowed on the street outside it.

Mr. O’Flynn commented on Mr. O’Donnell’s value of £4psf for the subject. He said that a value of £4psf was appropriate to good quality industrial offices. Space in this type of property was valued in terms of gross area; toilets, external walls and passages were included.

Under cross-examination by Mr. Hickey as to how his comparisons showed a tone of the list Mr. O’Flynn said he was constrained in his choice of comparisons. He had to choose properties in the area of the subject which had been recently valued. Mr. O’Flynn said his comparisons were different in that they did have direct street frontage. The subject did not have street access and consequently he had scaled back his values for it.

In his legal submissions Mr. Hickey said the appellant was not in exclusive occupation of the subject hereditament and this was stated twice in the licence agreement. Exclusive in this sense meant that the user of this hereditament could prevent any other user from using the property in the same way.

Mr. Hickey referred to the decision in the Supreme Court in the case of *Aer Rianta –v- Commissioner of Valuation*. This decision adopted the principle laid down in the case of *Westminster City Council v Southern Railway Co. and Others* [1936] A.C.511. The House of Lords held that the test of occupation was not necessarily contained in the terms of the document granting title. It is the *de facto* occupation, which is the determinative test.

Mr. Hickey referred to *Carroll v Mayo County Council*, [1967] I.R. 364. The judgement at pages 366 and 368 elaborated on the conditions which gave the defendant *de facto* occupation of the subject property in that case.

Mr. Hickey said the evidence before the Tribunal showed that the appellant did not have the use of the subject property to the extent that amounted to *de facto* occupation as specified in *Carroll v Mayo County Council*.

Mr. Hickey then referred to paragraphs 1,2,6,14,17,18,19, and 24 of the licence agreement.

Paragraph 1 stated that the appellant was not entitled to exclusive possession of the subject property. As to paragraph 2, this showed that the Museum had the power to vary the way in which catering was performed in the restaurant. Again the evidence had shown that the two weeks notice requirement contained in paragraph 2 had not been complied with.

Paragraph 6 required the appellant to provide the licensor's architects with details of the fit out to the restaurant.

Paragraph 14 set out detailed requirements for delivery of goods and removal of rubbish from the subject property.

Paragraph 17 showed the licensor was responsible for the re-decoration of the restaurant.

Paragraph 18 showed that the Hunt Museum did not undertake to give the appellant sole right to catering provision at the restaurant. There had been evidence that the licensor had been seeking quotations from other caterers.

In Mr. Hickey's submission paragraph 19 contains draconian provisions for the termination of the licence agreement.

Paragraph 24 of the licence agreement showed the vulnerability of the appellant's position in as much that she cannot claim compensation for loss of business.

Mr. Hickey referred to *Marine Terminals Ltd. -v- Commissioner of Valuation (VA97/2/002)*.

In that case the Tribunal found that Customs and Excise were not in rateable occupation of the building located on a stevedore's yard. At page 13 of the judgement a list of items of evidence which grounded the Tribunal's findings were shown.

In the present appeal Mr. Hickey said all these items of evidence had been replicated with one exception. That exception was that the appellant here paid a licence fee and service charges. In Mr. Hickey's submission this exception was not fatal to the appellant's claim.

In conclusion Mr. Hickey said that the appellant had to fail two tests on the rateability issue. Firstly if she failed the test that she was not in exclusive occupation of the subject then she had to show she was not in paramount occupation of the property. Mr. Hickey said the appellant had passed the first test but if the Tribunal was to find otherwise then he argued that she was not in paramount occupation of the property.

In her legal submissions Ms. Griffin referred also to Carroll –v- Mayo County Council. She said the test of paramount occupation is not the right to exclude the owner but whether there has been a withdrawal of the owner from occupation. Ms. Griffin quoted page 366 of the judgement to the effect that it is a question of fact as to who is in paramount occupation of a hereditament. Again at page 368 of the judgement, the test of withdrawal of occupation by the owner is set out.

Ms. Griffin said the evidence in this case showed the Hunt Museum had withdrawn from occupation of the subject. The licence agreement showed this and the Museum had abided by the terms of the agreement. Again no other catering firm had used the restaurant and this showed the appellant to be in paramount occupation of it.

Ms. Griffin referred to paragraph 13 of the licence agreement, which showed that the Hunt Museum would not infringe or compete with the activities of the restaurant. Ms. O'Donnell had acquiesced to the interventions by the Hunt Museum in the affairs of the restaurant. She could always have relied on the licence agreement to resist these interventions.

The Tribunal has considered the written submissions, the evidence, and the legal submissions of the appellant and the respondent. There are two issues proposed for the Tribunal to decide. Firstly, there is the issue of rateability and then the issue of quantum.

The licence agreement provides that the appellant is not in exclusive possession of the subject property. It is clear however from the authorities that the Tribunal must look at the *de facto* occupation of the hereditament to determine the rateability issue.

The only evidence (apart from the licence agreement) as to the immediate use or enjoyment of the subject hereditament was provided by the appellant, Ms. O'Donnell.

The Tribunal finds that the Hunt Museum is in paramount occupation of the subject hereditament.

This finding is based on the un-contradicted evidence of the appellant as to the physical and informal control exercised by the Hunt Museum over the restaurant. To this must be added the formal legal control exercised by the Hunt Museum Limited over the restaurant as contained in the licence agreement.

The Tribunal therefore determines that the appellant is not in rateable occupation of the subject hereditament. Accordingly, the valuation lists should be amended by deleting the name of the appellant as the rateable occupier of the subject hereditament.

In view of the foregoing finding it is unnecessary for the Tribunal to consider the issue of quantum.