

Appeal No. VA02/3/002

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

Weir & Sons Dublin Limited

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Shop at Lot No. 19Ca Merrion Road, ED/Ward: Pembroke East E, County Borough of Dublin

B E F O R E

Fred Devlin - FSCS.FRICS

Deputy Chairperson

Joseph Murray - Barrister

Member

Patrick Riney - FSCS FRICS FIAVI

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 16TH DAY OF APRIL, 2004

By Notice of Appeal dated the 9th day of May 2002, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €28 on the relevant property above described.

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

"(1) The Valuation is excessive and inequitable.

(2) The Valuation is bad in law."

1. This appeal proceeded by way of an oral hearing held in the offices of the Valuation Tribunal at Ormond House, Ormond Quay Upper on the 25th November 2003. At the hearing the appellant was represented by Mr. Brendan Conway BL instructed by Ms. Maire Conneely of A & L Goodbody Solicitors and the respondent by Mr. James Devlin BL instructed by the Chief State Solicitor's Office.

2. The Relevant Property

The relevant property is a small retail unit located in the main lobby of the Four Seasons Hotel, Ballsbridge, Dublin 4. The property is occupied by Weir & Sons Dublin Ltd. under a Licence Agreement dated the 4th April 2000 for a period of one year from the 1st July 2000 and thereafter from month to month terminable by either party on two months notice. The initial quarterly License fee of £3000 (€3809.21) is subject to review on an annual basis. The area of the subject premises is agreed to be 19.8m².

3. The Licence Agreement

The Tribunal was provided with a copy of the Licence Agreement dated the 4th April 2000 and *inter alia* the agreement contains the following main provisions.

“ the Licensed Use means the operation of a first class shop which shall sell only: clothes, jewellery, fashion accessories, pictures, small souvenirs, books, sweets, chocolates, stationery, cigarettes, cigars, newspapers, non-prescription pharmacy articles and toiletries or such other items as the Licensor may expressly approve in writing. The Licensee shall at all times sell the following items: Four Seasons logo items, Irish gifts, a full range of toiletries and international periodicals.

2.12 *The Licensee to use in common with the Licensor and all other persons entitled or authorised at all times during the Licensed Period to pass and re-pass over the Common Areas for the purposes only of gaining access to and egress from the Licensed Unit subject to such regulations as the Licensor may from time to time impose.*

3.2.1 *To use the Licensed Unit for the purposes only of the Licensed Use and for no*

other purpose whatsoever.

- 3.2.4 *Not to violate the Licensor's rules and regulations as such may exist from time to time.*
- 3.2.5 *To conduct business in the Licensed Unit in a professional and orderly manner and to maintain a high quality of service.*
- 3.11.1 *To comply fully at all times with such rules, regulations, directions or controls as may be made or issued from time to time by the Licensor in relation to the Licensed Unit, the License Use or for the good management of the Premises.*
- 3.11.6 *To carry a full and complete stock of seasonable merchandise offered for sale at competitive prices.*
- 3.11.7 *To employ adequately trained personnel for efficient service to customers and to procure that all such staff shall conform to the same standards of presentation, cleanliness, hygiene, codes of discipline and security requirements as staff employed by the Licensor in the Premises.*
- 3.11.8 *To adopt a trading style for the Licensed Unit which will not prejudice the general trading style of the Licensor in the Premises.*
- 3.11.9 *To open the Licensed Unit for business during the entire of the Licensed Period seven days per week during the hours between 7.30am and 10.00pm Monday – Saturday and between 8.00am and 9.30pm on Sundays or as may be determined or varied by the Licensor from time to time upon reasonable notice.*
- 3.11.10 *To ensure that deliveries of stocks to the Licensed Unit are made only through the "goods received" entrance to the Premises and be responsible for acceptance of deliveries.*

4.1.1 The Licensee shall be a licensee only and accordingly this Licence is not intended nor shall it operate or be deemed to operate either at law or in equity as a demise of any property the subject matter of this Licence or any alternative property that may be substituted therefor nor shall the relationship of landlord and tenant exist or arise or be deemed to exist or arise between the parties hereto, nor shall the Licensee have any exclusive right to the Licensed Unit.”

4.4.3 The Licensor may from time to time and at any time during the Licensed Period request the Licensee to move to another location within the Premises upon giving to the Licensee reasonable notice in writing and in such event the matters and agreements set out in this Licence shall apply to such alternative location which shall then become the Licensed Unit as defined herein.

4. Valuation History

The subject property was first valued in November 2001 and included in the overall assessment for the Four Seasons Hotel. At First Appeal stage the appeal valuer created a separate valuation Lot in respect of the Weir unit and determined the Rateable Valuation at €28.

The only issue before this Tribunal is whether or not the unit should be separately valued.

5. The Appellant’s Evidence

Ms. Barbara Roy, the Manageress of the relevant property, in her evidence said Weir’s rationale in relation to the operation of the unit was two-fold – firstly to generate business for its outlet on Grafton Street and secondly to provide a service to the hotel guests.

Ms. Roy said she had managed similar units in other hotels and in her experience the measure of control exercised by the management of the Four Seasons Hotel was much greater and more intrusive than elsewhere. As examples of the control exercised by the hotel she highlighted the following:

- The fact that the overall operation of the unit and the staff attitude was continually monitored by the hotel management and was also subject to ongoing guest comment and statistical analysis;
- The control of the range of merchandise offered for sale in the unit included on occasions directions that specific items of stock and make be included;
- The requirement that hotel guests have the facility to charge items to their rooms giving rise to increased administration costs;
- The restrictions imposed by the hotel regarding the delivery of goods;
- The location and style of the shop signage was dictated by the hotel without consultation;
- The requirement that Weir's employees conform with hotel guidelines in relation to customer services.

Ms. Sheelagh O Buachalla, BA ARICS a director of GVA Donal O Buachalla & Company Ltd. gave expert evidence in relation to valuation matters. Ms. O Buachalla said that it was the general practice of the Valuation Office to value retail outlets in hotel lobbies as part of the hotel valuation. Ms. O Buachalla introduced a number of comparisons in this regard and said the only exception to this practice as far as she was aware was the Berkeley Court Hotel where there were three kiosk type units all of which were separately assessed. Ms. O Buachalla said that the circumstances in relation to the Berkeley Court situation were similar to this appeal in that the kiosks were included in the hotel valuation at the revision stage but subsequently assessed separately at first appeal stage. The appeal valuer in the first instance was Mr. Tom Stapleton, now retired, whose function in the matter was taken over by Mr. Terence Dineen who was the appeal valuer in the Four Seasons appeal. Ms. O Buachalla said that in her opinion no good reason existed for a departure from the general practice of valuing kiosks as part of the hotel premises.

6. The Respondent's Evidence

Mr. Terence Dineen, BAgr, is a District Valuer in the Valuation Office. Mr. Dineen said he was of the opinion that the relevant property should be separately assessed having regard to

the terms and conditions of the Licence Agreement and the facts as he found them. He acknowledged that the revising valuer had taken a contrary view. He also acknowledged that with the exception of the Berkeley Court Hotel it appeared to be the practice of the Valuation Office to value shops in hotels as part of the overall assessment of the hotel. Mr. Dineen said that he did not consider himself constrained from taking a contrary view having regard to the facts and rating law and practice. In his opinion Weir's were in exclusive and beneficial occupation of the subject unit and were therefore liable to rates.

7. The Appellant's Case

Mr. Brendan Conway, BL, contended that it was clear from the evidence that Weir's actual occupation is considerably less than that suggested by the Licence Agreement. The degree of control exercised by the hotel on the day-to-day operation of the subject unit, including elements of staff management and regulation and the control of merchandise offered for sale all indicated clearly that the premises is effectively a hotel shop under the governance of the hotel management. Hence the hotel was in paramount occupation and liable for rates.

Mr. Conway said that in order to sustain an argument for a separate assessment the respondent must show a clear withdrawal from control by the hotel and an examination of the facts indicated clearly that this is not the case. Mr. Conway said it was clear from the undisputed evidence tendered by Ms. O Buachalla that it was the practice of the Valuation Office to value shop units in hotel lobbies as part of the hotel assessment. The only exception to this practice is the Berkeley Court Hotel where Mr. Dineen had been the appeal valuer.

Mr. Conway said that under the Valuation Act 1986 it is necessary to make comparisons with other properties in the same mode or category of use. Accordingly, the Valuation Office could not depart from their established practice of valuing shops in hotels as part of the overall assessment for the hotel. Based on the facts in this appeal and the general practice of the Valuation Office the subject unit should be valued as part of the Four Seasons Hotel and not separately assessed as proposed by the respondent.

8. The Respondent's Case

Mr. James Devlin, BL, said the only issue to be determined was whether or not Weir's were in exclusive occupation. In this regard the facts clearly indicated that Weir's were in beneficial occupation by virtue of the Licence Agreement and were subject to minimal interference from the hotel authorities. Weir's had their own staff, signage and management structure. The level of control exercised by the hotel was minimal in extent and not material in nature nor did it interfere with Weir's occupation and quiet enjoyment of the subject unit. The right reserved to the hotel requiring Weir's to move to another location within the hotel did not detract from Weir's exclusive occupation and in fact had never been exercised. Mr. Devlin said the matter of occupation for rating purposes depended on an examination of the facts in each case. The argument put forward by the appellant that it was the practice of the Valuation Office to value shops in hotel lobbies as part of the hotel assessment was not conclusive without a full exploration of the facts in each instance. No evidence to this effect had been adduced. Accordingly, the Tribunal had to look solely at the facts in this appeal having regard to the Valuation Act and relevant case law.

Findings

Both parties were represented at the oral hearing by counsel and the Tribunal was greatly assisted by their submissions. The Tribunal, having carefully considered all the evidence offered, the submissions, legal authorities and documentation, makes the following findings:

- 1.** The rateable valuation of the relevant property in this instance is to be determined in accordance with the now repealed enactments i.e. section 11 of the Valuation (Ireland) Act 1852 as amended by section 5 of the Valuation Act 1986;
- 2.** The essential elements of rateable occupation in Ireland are well established in law. Nonetheless, difficulties can arise in circumstances where the occupation of a rateable property by one party is subject to control and regulation by another party. In such instances the party held to be in paramount occupation will be the occupier for rating purposes and this can only be determined by a critical examination of the facts.

The four elements of rateable occupation are long established in law and may be summarized as follows:

- Occupation must be actual
- Occupation must be exclusive
- It must be of value or benefit to the occupier
- It must not be transient

Actual occupation is not applicable in Irish law, nevertheless the owner while not in occupation may be amenable for rates. The remaining three elements are essential. See **Telecom Eireann v Commissioner for Valuation (1994) 1 IR 66** and **Keane on Local Government. 2nd Ed., 2003 Patrick Butler Page 346.**

Of the elements stated above, the one that was in issue before the Tribunal was that of “exclusive occupation”. The character of this principle is built around the word “use” or “user”. If the character is such that the use which the occupier makes of the land or building is such that others are necessarily excluded from using it in the same way, he will, if the other ingredients are satisfied, be rateable. If there are two competing occupiers of land or buildings or where one party is subject to control and regulation by another and it cannot be established who is in exclusive occupation, then it must be established who is in “paramount occupation”. However, when this has been done, how does one reconcile “exclusive occupation” with that of “paramount occupation.”? The answer to this question is found in Judge Lloyd’s judgment of **Wimborne District Council v Brayne Construction Company Ltd. and W.H. White Company Limited. B[131] 114 Ryde on Rating 2003.** It states as follows:

“I have found some difficulty during the argument in understanding how the requirement that occupation must be exclusive could be reconciled with the well established rule that where there are two competing occupiers of the same hereditament, it is the paramount occupier who is rateable. If there are two occupiers of the same hereditament, how can either be exclusive? Counsel for the ratepayers submitted in the Reservoir Aggregates case that the paramount occupier is treated as being the exclusive occupier ”

3. The concept of control can be understood in two senses. Control in the form of covenants or restrictive covenants regarding the occupation of a property is not generally of great materiality (Armour page 318). However where control is of such a nature and extent so as to impinge on the use and enjoyment of a property then such control is material and begs the question - who is in paramount occupation and hence liable for rates?
4. In relation to this appeal it is common case that the hotel exercises a measure of control over the day-to-day operation of the subject unit. The only matter in dispute is whether or not the control so exercised is of such a nature as to be “material” and sufficient in extent as to give rise to paramount occupation.
5. Weir’s right to occupation is derived from the Licence Agreement dated the 4th April 2000. It is clear from the agreement that the occupation is subject to the control of the hotel in a number of matters such as access and egress, opening hours, stock content, staff control and fit out. However it is clear from the evidence of Ms. Barbara Roy that the actual control on a day-to-day basis is greater and more intrusive.
6. The hotel regularly conducts an analysis of guest comments on all aspects of the hotel’s activities and services including the Weir unit. Copies of this analysis which covers such items as the attitudes of staff and quality/quantity of the shop facilities are made available to Weir’s on a monthly basis. Weir’s are required to meet performance targets set by the hotel and are subject to continual monitoring in this regard.
7. The Tribunal has carefully examined all the facts in this case and has come to the conclusion that the control exercised by the hotel represents a degree of interference with the use and enjoyment of the subject unit by Weir’s to the extent that it can be fairly stated that pre-eminent control rests with the hotel. Whilst Weir’s do exercise a degree of management and control, the overriding control of the operation of the Licensed Unit rests with the hotel who perceive the unit to be an integral part of the services afforded to their guests. Accordingly therefore the Tribunal finds that the hotel is in paramount occupation of the Licensed Unit and hence it follows that it should be valued as part of the hotel premises.
8. During the course of the appeal it was argued that the Valuation Office could not depart from what appeared to be the practice of valuing retail units as part of the valuation of

the hotel. The Tribunal is not persuaded by this argument and is of the opinion that each case must be considered on its own merits following a critical examination of all relevant facts.

Determination

Having regard to the above the Tribunal directs that the entry be struck out and that the unit be valued as part of the hotel premises.

Appendix 1

The following are the authorities and documentation presented to the Tribunal.

1. Westminster Council v Southern Railway Company
2. Beaumont Hospital Board v Commissioner of Valuation – VA96/3/068
3. Carroll v Mayo County Council
4. Armour on Valuation for Rating
Pages 302 - 323
5. Ryde on Rating and the Council Tax – Issue 29 pages 131 - 137