

Appeal No. VA08/5/117

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

**J. Harris Assemblers Ltd.**

**APPELLANTS**

**and**

**Commissioner of Valuation**

**RESPONDENT**

RE: Property No. 408482, Warehouse at Naas Road, County Dublin  
Preliminary Issue

**B E F O R E**

**Fred Devlin - FSCS.FRICS**

**Deputy Chairperson**

**Brian Larkin - Barrister**

**Member**

**Frank O'Donnell - B. Agr. Sc. FIAVI.**

**Member**

**JUDGMENT OF THE VALUATION TRIBUNAL**  
**ISSUED ON THE 18TH DAY OF NOVEMBER, 2008**

By Notice of Appeal dated the 31st day of July, 2008 the appellant appealed against the determination of the Commissioner of Valuation in fixing a valuation of €2,238,000 on the above described relevant property.

The grounds of Appeal as set out in the Notice of Appeal are "the valuation is incorrect when rental levels are taken into consideration. The rated occupier is liable for the costs of relining the Camac river which flows under the property. This affects rental levels"

1. At the mutual request of the parties, the oral hearing in relation to this appeal was held contemporaneously with those in relation to appeals reference **VA08/5/114** and **VA08/5/008**. The said oral hearings were held in the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 21<sup>st</sup> day of October, 2008.
2. At the oral hearing the appellant was represented by Mr. Owen Hickey, Senior Counsel instructed by McGuire Desmond Solicitors. Mr. Brendan Conway, BL, instructed by the Chief State Solicitor, appeared on behalf of the respondent, the Commissioner of Valuation.
3. Evidence in relation to the property concerned was given at the hearing by Mr. Pat Davis, a Consulting Engineer of Clifton Scannell Emerson Associates Limited, Mr. John O'Connell, a Solicitor of McGuire Desmond Solicitors, and Mr. Tadhg Donnelly, MIAVI, of Brian Bagnall & Associates.
4. Mr. Denis Maher, SCS, MRICS, a Valuer in the Valuation Office, gave evidence on behalf of the Commissioner of Valuation.

### **Property Concerned**

5. The property concerned in this appeal is a large industrial facility located on the Naas Road and used for the assembly of trucks for the construction and transport industries.

### **Material Facts**

6. From the evidence introduced at the hearing the following material facts emerged or were so found which are common to all of the above mentioned appeals:
  - (a) Sometime around the late 1960's or the early 1970's the developers of the John F. Kennedy Industrial Estate culverted the Camac river as part of the site infrastructural works.
  - (b) The culvert is of "pin-arch" design and of in-situ reinforced concrete construction. The culvert is some 2 to 2.5 metres wide and 2.0 metres high.
  - (c) At the request of the South Dublin County Council, Nicholas O'Dwyer and Partners, Consulting Engineers carried out a survey of the Camac culvert. A report submitted to the Council stated that the culvert was found to be in a very poor structural condition with structural cracking and that an entire section of the culvert had effectively failed and had

reached a plastic state. This means that the culvert will continue to distort without any additional load being added to it.

- (d) The report also stated that the culvert was in its final state of failure.
- (e) In the light of the O'Dwyer report the County Council served the affected land owners with notices pursuant to section 3 of the Local Government (Sanitary Services) Act, 1964 as amended by the Environmental Protection Agency Act, 1992. The said notices were issued on various dates in August, 2005. The County Council recommended that the culvert be reconstructed as well as the introduction of a number of precautionary measures deemed necessary in order to prevent further damage and deterioration to the culvert.
- (f) It would appear that the culvert had not been taken in charge by the County Council at any time, so that the cost of reconstructing the culvert falls on the affected property owners.
- (g) Mr. Davis in his evidence expressed the view that the failure of the culvert was due to poor workmanship and not inadequate design.
- (h) Reconstruction of the culvert will require a section 50 license under the provisions of the Arterial Drainage Act, 1945. The licensing authority under the Act is the Office of Public Works (OPW). It is likely that the design specifications set down by the OPW as a condition of the granting of a section 50 licence will double the capacity of the existing culvert. This requirement will result in a price uplift of approximately 30% over and above the cost of equivalent reinstatement.
- (i) Discussions with the County Council (some 3 years after the dates on which the section 3 notices were served) are ongoing and it is anticipated that reconstruction work will commence in the relatively near future.
- (j) The Camac culvert runs parallel to the boundary fence along John F. Kennedy Road within the property owned and occupied by the appellant.
- (k) Acting on their consulting engineer's advice the appellant has brought into force restrictions regarding the parking and movement of vehicles along the line of the culvert.
- (l) During reconstruction works it will be necessary to cordon off a strip of yard area which will further restrict the circulation space between the rear of the building and the boundary fence along John F. Kennedy Road.
- (m) Whilst the culvert is in poor condition there is no accurate way of determining how long the culvert could remain in this current state before a collapse of some kind occurs along

its length. In the event of a collapse there would be an immediate danger of severe flooding at the location of the collapse.

(n) It is common case that the cost of replacing the culvert represents capital expenditure and not repairs within the context of section 48(3) of the Valuation Act, 2001.

7. At the commencement of the hearing the parties requested that the Tribunal deal with a number of matters of a legal nature as a preliminary issue. The issues raised by the parties which are common to all three appeals may be summarised as set out below.

#### **8. The Appellant's Submissions**

(a) In the first instance, the appellant contended that the effect of the section 3 notice was to render the property concerned incapable of beneficial occupation and not rateable.

(b) In the alternative the appellant contended that the property must be valued in "its actual state." As a matter of fact the property is dangerous and damaged and hence its value is significantly less than that of those comparable properties that are not so damaged. The rule of *rebus sic stantibus* cannot be abandoned so as to permit the respondent to value the property as if it were not dangerous and damaged in the manner that it is.

#### **The Respondent's Submissions**

9. The respondent contended that the reconstruction of the Camac culvert represents capital expenditure and could not be categorised as repairs encompassed by section 48(3) of the Valuation Act, 2001. This section creates the assumption that the appellant would bear "*the probable average annual cost of repairs .... that would be necessary to maintain the property in [its actual state]*". Once-off expenditure such as the cost of reconstructing the culvert cannot be included under the "*average annual cost of repairs*" proviso.

10. Furthermore the respondent contended that the culvert reconstruction works could not be classified as works on the relevant property which is encompassed by paragraph 1(a) of Schedule 3 of the Valuation Act, 2001. The culvert it was contended is extraneous and unconnected with the property concerned and hence the cost of the works could have no bearing on the determination of its net annual value.

11. The respondent also contended that the operation of section 48(3) necessitated the concept of a hypothetical landlord and a hypothetical tenant and *inter alia* provided that the tenant be

responsible for “*the probable average annual cost of repairs.... to maintain the property in that state.*” This requirement must be seen in the context that all other necessary expenditure such as the works associated with the reconstruction of the culvert would be the responsibility of the hypothetical landlord before the property is rented to the hypothetical tenant.

## Findings

The Tribunal has carefully considered all the evidence and arguments adduced at the oral hearing and finds as follows:

1. The Camac culvert runs just inside the northern boundary fence of the property concerned for a distance of about 490 metres. It is therefore within the curtilage of the property and is part and parcel of the property to be valued under section 48 of the Valuation Act.
2. Schedule 3 of the Act sets down the categories of property which are “*relevant property for the purposes of this Act*” subject to compliance with the conditions referred to at paragraph 2 of the Schedule.
3. Paragraph 2 of Schedule 3 states as follows:  

“*The condition mentioned in paragraph 1 of this Schedule is that the property concerned-*  
*(a) is occupied and the nature of that occupation is such as to constitute rateable occupation of the property, that is to say, occupation of the nature which, under the enactments in force immediately before the commencement of this Act (whether repealed enactments or not), was a prerequisite for the making of a rate in respect of occupied property, or*  
*(b) is unoccupied but capable of being the subject of rateable occupation by the owner of the property*”.
4. The property concerned in this appeal is undoubtedly relevant property within paragraph 1 of Schedule 3 and is therefore rateable as it meets the condition set down in paragraph 2.
5. In the context of this appeal there are two preliminary questions to be asked. Is the property occupied? And if so is the occupation beneficial? The answer to the first

question is in the affirmative and indeed was not an issue in the appeal. Hence, on the face of it, it meets the condition set down in paragraph 2.

6. In section 3 of the Valuation Act, 2001 occupier is defined in the following terms: *“occupier” means, in relation to property (whether corporeal or incorporeal), every person in the immediate use or enjoyment of the property”*.
7. Occupation is not defined in the Act, nor was it defined in any of the repealed valuation statutes. *“In England there is no statutory definition of the word ‘occupation’; but by judicial decision, four essential ingredients of rateable occupation in English law have emerged:*
  1. *There must be actual occupation.*
  2. *The occupation must be exclusive.*
  3. *The occupation must be of value or benefit to the occupier.*
  4. *The occupation must again not be for too transient a period.”*

(Keane’s, **The Law of Local Government in the Republic of Ireland [1982]** at page 283).

For beneficial occupation to exist, there must be some value in the occupation of the property concerned, *rebus sic stantibus*. It is clear from the evidence tendered that the appellant at the relevant date was (and continues to be) “in the immediate use or enjoyment of the property” for the purpose of truck assembly. Whilst the damage to the Camac culvert to some degree interferes with or limits the use of a section of the property, the restrictions imposed are minor in extent, relative to the scale and nature of the property concerned and of insufficient import as to render the property incapable of use for their current purposes. It cannot be said that the occupier does not benefit from that occupation, subject as it is to some minor restrictions in his use. Under no circumstances can it be said that they are “struck with sterility in any and everybody’s hands” (**London County Council v Erith Churchwardens [1893] AC 562 at 591**). The Tribunal finds, therefore, that the property is in beneficial occupation and hence rateable.

### **Rebus Sic Stantibus**

9. Section 48(3) requires that the property concerned be valued *“in its actual state”* and that the tenant will be responsible for bearing *“the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in*

*that state*". In other words, the property must be valued as it was found on inspection – no assumptions must be made as to what its state might be next year nor what state it was in last year.

10. In relation to the property concerned it is a fact that part of the Camac culvert lies within the curtilage of the property and hence is an intrinsic part of the property to be valued. It is also a fact that as a direct consequence of the poor structure of the culvert, restrictions on the use of a section of the property have been imposed. The purpose of these restrictions is two-fold – firstly, so as to do nothing that could further damage the culvert and secondly for health and safety reasons. It is also a fact that it will be necessary to reconstruct the culvert in the near future and this per force will entail additional restrictions in use during the course of the reconstruction period.
11. It is clear from the expert evidence that the culvert could collapse at any time at some point along its length. If this were to occur there would be a danger of severe flooding at the point of collapse and the adjoining lands.
12. The hypothetical tenant as envisaged in rating law would at the relevant valuation date, that is 30<sup>th</sup> September, 2005, have been aware of the Section 3 notice and all that flows therefrom, including the restrictions on the current use and future use of a section of the property and also the attendant risk of flooding due to the poor state of the culvert. These would all be factors to be taken into account when arriving at an estimate of rental value on the basis of the assumptions contained in section 48(3).
13. The cost of reconstructing the culvert is undoubtedly without the scope of the repairing assumptions contained section 48(3). The only obligation on the tenant under this section is the duty to maintain the property in its actual state. The rule of *rebus sic stantibus* and section 48 of the Valuation Act, 2001 requires that the property must be valued in its actual state and it cannot be assumed that the Camac culvert has been reconstructed.

### **Determination**

Having regard to the findings above the Tribunal determines as follows:

1. The property is in beneficial occupation.

2. The property concerned is to be valued in its actual state, *i.e. rebus sic stantibus*.
3. In arriving at an estimate of its net annual value under section 48, it cannot be assumed that the Camac culvert has been reconstructed as required under the section 3 notice.
4. The cost of reconstructing the culvert is without the repairing assumptions contained in section 48(3).
5. Accordingly, therefore the property must be valued in its existing state.
6. A hypothetical tenant in the market would be aware of the restrictions imposed by the dangerous state of the culvert which is an intrinsic part of the property to be valued.
7. The hypothetical tenant would also be aware of the inherent risk of flooding were a failure of the culvert to occur within the boundaries of the property concerned and would also be conscious that this possibility could give rise to higher than normal insurance costs.

And the Tribunal so determines.

This determination applies equally to appeals reference VA08/5/008 and VA08/5/114.