Appeal No. VA10/5/090 & 091

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Bank of Ireland **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

and

Dublin Airport Authority **NOTICE PARTY**

RE: Property No. 305324, Bank at Bank of Ireland Branch, Arrivals Departures Hall, Terminal 1, Dublin Airport and Property No. 2164180, ATMs at Arrivals, Departures, Multistorey Car Park, Dublin Airport, County Dublin.

B E F O R E

John O'Donnell - Senior Counsel **Chairperson**

Tony Taaffe - Solicitor **Member**

Fiona Gallagher - BL **Member**

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 28TH DAY OF FEBRUARY, 2011

By Notices of Appeal dated the 1st day of September, 2010 the appellant's appealed against the determination of the Commissioner of Valuation in fixing valuations of €1,759,000 (VA10/5/090) and €150,000 (VA10/5/091) respectively on the above described relevant properties.

The Grounds of Appeal are set out in letters enclosed with the Notices of Appeal, copies of which are attached at the Appendix to this judgment.

This appeal proceeded by way of an oral hearing, at the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 24th day of January 2011 and resumed on the 7th day of February 2011. At the hearing, the appellant was represented by Mr. Prionnsias O Maolcháin BL, instructed by Ms Lorraine Hayes, Group Property Solicitor, Bank of Ireland. Mr. Aidan Reynolds of Savills gave expert evidence on behalf of the appellant. Mr. Brian Kingston of Bank of Ireland also attended. Ms. Gráinne O'Neill, BL, instructed by the Chief State Solicitor's Office appeared on behalf of the respondent, the Commissioner of Valuation. Mr. Pat Kyne, a Valuer in the Valuation Office gave expert evidence on behalf of the respondent. The notice party, Dublin Airport Authority (DAA), was represented by Mr. Owen Hickey, SC, instructed by Arthur Cox & Co. Solicitors. Mr. Martin O'Donnell, O'Donnell Property Consultants gave expert evidence on behalf of the notice party. Mr. Terry Devlin also of O'Donnell Property Consultants and Mr. John Brennan of DAA also attended.

Background

The Appellant entered into a Licence Agreement with Dublin Airport Authority ("*DAA*") in 2006 under which it agreed to provide banking facilities at Dublin Airport. The banking facilities provided included a banking hall, a foreign exchange bureau and various ATMs (which are hereinafter collectively referred to as "the subject premises") throughout the buildings. The Commissioner of Valuation issued a Valuation Certificate in respect of Dublin Airport on the 31st of December 2009 which valuation was referable to the entire airport terminal and was calculated by reference to a general valuation based on the Contractor's Method (i.e. depreciated replacement cost) referred to in Section 50 of the Valuation Act, 2001 ("the Act").

The Issues

The issues required to be decided upon by the Tribunal:-

(i) Are the ATMs "*relevant property*" for the purposes of the 2001 Act?

(ii) If the answer to (i) is yes, have the subject properties already been included in the general valuation of the airport?

(iii) If the answer to (ii) is no, what is the correct methodology for valuing the subject premises for the purposes of the Act?

The Appellant's Case:

On behalf of the appellant, Mr. Aidan Reynolds, Valuer, gave evidence. He adopted his précis (updated 17th January 2011). He referred to the Licence Agreement entered into between the parties in 2006. The Bank had facilities in Departures, though it now has facilities in Arrivals. The revaluation in the Fingal area was what gave rise to this appeal. As he understood matters, all other concession licensees in the terminal were valued as part of the terminal overall, on a depreciated replacement cost (DRC) basis (as provided for under Section 50 of the Act).

Mr. Reynolds contended that the reason why the subject premises were now being valued separately, and a separate Certificate was being issued in respect of those premises, was because of an error on the part of DAA. This error occurred because DAA did not inform the relevant Local Authority that Bank of Ireland was one of the concession licensees to be included in the overall valuation of the terminal.

Mr. Reynolds contended that it was accepted by the Local Authority that the DAA was occupier of the foreign exchange premises and the various ATMs. In relation to the ATMs, he said that there was one ATM in the car park, two in Arrivals and two in Departures making a total of five. In addition, he said that of the two in Arrivals, one of those ATMs is in the Bank premises itself. ATMs are wall-mounted with the service area to the rear.

Mr. Reynolds referred to the Valuation Certificate issued in respect of the Airport for a sum of in excess of €89million. However, the subject premises had been excluded from the valuation. He referred to a Schedule of the revaluation of Dublin Airport which suggested a rate per square metre on average throughout the Terminal of €5,650 per square metre when calculated on a DRC/Section 50 basis.

Mr. Reynolds looked in more detail then at each of the individual subject premises:-

(i) The Banking Hall:

The banking hall is in Arrivals. While initially valued at €3,000 per square metre, this was reduced to €2,500 per square metre.

(ii) The Foreign Exchange Bureau:

The foreign exchange bureau is in Departures. Departures is a significantly more lucrative location than Arrivals. The Valuation Office valued the foreign exchange bureau at €30,000 per square metre, which figure was upheld on first appeal.

(iii)The ATMs:

The ATMs are valued by the Valuation Office at €30,000 per square metre.

Thus the valuation, according to the Valuation Office, in respect of each of the individual subject premises are:-

(a) Banking hall - 445 sq. metres @ €2,500 per sq. metre = €1,112.500

(b) Foreign exchange bureau - 21.55 sq. metres @ €30,000 per sq. metre = €646,500

(c) ATMs (5) – 5 sq.mtrs @ €30,000 per sq. metres = €150,000

Mr. Reynolds felt that this was an excessive valuation. The actual rate per square metre applied by the Valuation Office to the Departures Hall equates to approximately €320.00 per square metre. Therefore, the existing valuation of €30,000 per square metre in respect of the Foreign exchange and ATMS is over 93 times greater than that applied to the valuation of the Airport.

If, however, the DRC/Section 50 basis was applied to all of the premises under consideration using the €5,650 per square metre rate previously referred to, this would produce the following valuation:-

(a) Banking hall and Foreign exchange bureau

Depreciated Replacement Costs applied to Dublin Airport Terminal = €5,650 per sq. metre
Less Allowance for Age and Obsolescence @ 20% = €4,520 per sq. metre
Site Cost per hectare = €18,532,500
Subject Floor Area = 466.55 sq. metres

DRC of Subject Floor Area:

466.55 x €4,520 =	€2,108,806
466.55 x €18,532,500 = 10,000	€864,634
Total DRC	**€2,973,440**
NAV @ 5%	**€148,672**
Say	**€150,000**

(b) ATMs

Depreciated Replacement Costs applied to Dublin Airport Terminal = €5,650 per sq. metre
Less Allowance for Age and Obsolescence @ 20% = €4,520 per sq. metre
Site Cost per hectare = €18,532,500
Subject Floor Area = 5 sq. metres

DRC of Subject Floor Area:

5 sqm x €4,520 =	€22,600
5.00 x €18,532,500 = 10,000	€9,266
Total DRC	**€31,866**
NAV @ 5%	**€1,593**
Say	**€2,000**

Obviously there is a vast differential between these two methods of valuation and the choice of method of valuation is critical.

Mr. Reynolds referred to the fact that the Vodafone unit and the Airport Pharmacy unit were also concession licence units which appeared to be valued on the basis of the licence fees payable by them. However, he indicated that in his view they also appear to have been valued on a DRC/Section 50 basis. Either way, he was of the view that both units were significantly different in floor area to the subject premises. In addition, as there was no basket of rents to establish the "*tone of the list*" in the airport (because the entire airport, with the exception of the subject premises, had been subjected to a general valuation), it was not appropriate to look at the licence fees payable by Vodafone or the Pharmacy.

Mr. Reynolds indicated that while certain of the premises had previously been occupied by the Bank, he did not know what the rental paid by the Bank to the DAA was. His view was that before one could consider the licence fee as a relevant factor, one would need to see all of the concession licences with all of the floor areas; only then could one arrive at a rate per square metre based on the licence fee.

Mr. Reynolds emphasised that the bank in question had been in the airport since the 1970s but had no landlord or tenant rights. It had put in a tender in the year 2000 for the period 2000 to 2007. In his view, any such tender was likely to have factored in a significant premium to be paid by the Bank. The Bank did have the licence extended in or about 2006. In his view, the licence fee would encompass factors such as the fact that the Bank had been there for 30 years or more, had been trading in the airport and would have goodwill built up. In his view, the Bank was in a unique situation where it was trading for such a lengthy period of time but where it had no Landlord & Tenant Agreement and, therefore, no rights which might attach to a tenant in such circumstances. In his view, no other occupier would find itself in similar circumstances. Therefore, it was unwise and inappropriate to rely on the licence fee as a method of fixing the rate or market rent as these factors would have to be extrapolated out of the licence fee paid.

In addition, the licence fee is based on turnover, though there is no exact figure fixed per annum in advance, as far as he is aware.

In Mr. Reynolds' view, no other retailer or occupier would go into occupation of the premises if they had to pay the rates liability fixed by the respondent herein.

In cross-examination Mr. Reynolds contended that apart from the terminal hall itself, of the 122 other valuations in the airport this was the only subject property to be valued on a contractor's basis. He accepted that the contractor's basis was normally used where no comparable evidence was available over specialised properties. The purpose of the use of the contractor's basis was to get an estimate of the NAV. In his view, the estimation of a composite NAV, arrived at by use of a contractor's basis, is not affected by the often-different usages of different parts of a building. In his view, the use of the contractor's basis is appropriate here because every other unit (e.g. restaurants or other retail units) is valued on the same basis, as agreed by DAA and the local authority in respect of the general valuation previously referred to.

Mr. Reynolds also contended that the airport pharmacy and Vodafone had been valued on a DRC (i.e. contractor's costs) basis. In his view the only (and best) comparison is the airport termination valuation. Other concessionary units were not valued separately.

Mr. Reynolds noted that the airport pharmacy and Vodafone valuations did not indicate how the market rent would be arrived at for those premises. In his view, the licence fee paid by Bank of Ireland here did not equate to a "*market rent*"; Bank of Ireland was "*over a barrel*". It did not have the benefits or rights of a tenant and could be moved on at any time. He noted the passing rent appeared to have been agreed, by way of tender, by Bank of Ireland in 2000. However, in his view, the Bank of Ireland almost certainly paid a huge premium to get this licence in 2000. He contended that Bank of Ireland did not occupy the foreign exchange bureau any more, as a result of a new tender. It was unclear whether or not Bank of Ireland did or did not participate in the previous tender. However, he noted that the appropriate date for the purposes of the valuation here was 2005, at which time Bank of Ireland were in occupation of the foreign exchange bureau. In his view, the licence fee could not be regarded as the passing rent or the market rent.

Mr. Reynolds indicated that he was not given details of the rental/licence fee paid by Bank of Ireland. However, he expressed the view that it wasn't necessary to set out such figures because they were irrelevant. He noted that the total square meterage involved was 466.55 being .37% of the terminal building. He did not, however, feel it was more appropriate to value those premises as a percentage of the retail property in the terminal. He was of the view

that, in order to be consistent with the other valuations of the other units in the terminal (such as restaurants), the appropriate valuation was the DRC basis i.e. €5,650 per square metre.

Mr. Reynolds was also cross-examined by Counsel for the Notice Party, DAA. He indicated he had worked on valuations and on other rating related issues before over the last eight years, though he had not appeared frequently to give evidence in cases.

Mr. Reynolds indicated that, in essence, the open market rent of a property is its rateable valuation or very close to it. However, in his view, Bank of Ireland had a very special interest in tendering for these premises. He was not involved in the tendering process, though he accepted it could be based on turnover. Turnover rents can form the basis of a rateable valuation in principle, but this would require an analysis of the turnover and other back-up figures. In his view, he would look at the best comparable evidence. He did try to establish the open market rent and asked the Valuation Office how everyone else had been valued. He indicated that the Valuation Office had indicated to him that everybody else had been included in the overall valuation. Mr. Reynolds expressed the view that NAV in question was too high. He tried to find out how other concessionaries had been valued in order to compare them with the subject premises; it was only then that he realised that the valuation of the remainder of the terminal had been based on DRC (Section 50). He did not ask for - and did not receive - a specific figure which Bank of Ireland were paying by way of licence fee, but again repeated that he did not regard this as relevant. In his view, the history of Bank of Ireland's dealings with the DAA were what mattered; i.e. their presence there since the 1970s, the fact that they were, in effect, a "*special interest*" party, the fact that they had no landlord and tenant rights and the fact also that no other tenant (or bank) would pay that fee meant, in the circumstances, as far as he was concerned, the licence fee was to be disregarded.

Mr. Reynolds indicated that, in his view, it was appropriate for him to seek other comparisons in order to ascertain the NAV; it was only when he embarked upon this exercise that he discovered there were no other comparisons. He did not believe that an adjustment could be made in the licence fee for goodwill and other matters to which he had referred, because it was his belief that the subject premises should have been valued as part of the Airport Terminal. He explained again his view that the bank was *"over a barrel"* because there was no rent review, no power to apply to the Court to fix rent and no other mechanism of

establishing market rental value. He denied that the pharmacy or phone shop indicated a tone; he also pointed out that the fact that the Bank had invested a significant amount of money in the subject premises, and had a good will at those premises, which factors meant they were in an even more complicated position that an ordinary tenant.

Mr. Reynolds indicated that he believed the other concession licence units had been valued as part of the overall valuation of the terminal, including Vodafone and the airport pharmacy unit. He expressed the view that these premises had been valued on the contractor's cost basis. In his view the subject premises should have been valued as part of the Terminal at the time of the original valuation. The levels applied by the Valuation Office were agreed with DAA for the Terminal in general. He had found no other rateable valuations for other parties, since all of the properties were valued as part of the terminal valuation.

In Mr. Reynolds' view, Bank of Ireland had been excluded in error from the airport terminal valuation. The Bank's name had not appeared in the list of concession licensees provided by DAA to the relevant authority, though he did not know why this had occurred. As a result of this omission, an attempt to value the bank premises separately was made. While arguments were raised at Representations stage that the DRC basis of valuation should be used, these arguments were rejected. It appears to have been suggested also, on a without prejudice, basis at some stage during discussions between the parties, but not since.

An issue also arose as to whether an ATM is not a "*building*" but an easement, and is therefore not eligible to be rated under the Act. He denied that the ATMs could constitute a "*structure*" within the meaning of the Act.

The Respondent's Evidence:

On behalf of the respondent, Mr. Patrick Kyne of the Valuation Office gave evidence. He adopted his précis.

He indicated that the Valuation Office had been asked to put a valuation on all properties within the airport. Before 2006, certain of the bank's premises were in a different location. Between 2006 and 2009, the rent seemed to be uniform. The Valuation Office was given figures for rent under Section 45 of the Act from the Dublin Airport Authority, although Mr. Kyne accepted in evidence that the figures for rental set out in page 3 of the reports compiled

by Mr. Martin O'Donnell on behalf of the DAA were more accurate. He indicated that by "*rent*" he meant to refer to the "*licence fee*" payable by the appellant Bank to the DAA for the use of the properties in question. However, in his view, it was reasonably uniform.

Mr. Kyne indicated that for the purposes of valuation, the airport would be regarded as a unique property. However, he indicated that what was being valued in the instant case was certain banking premises. In his view, only two of the concessionary units had what he would describe as "*clean*" rents, being the Vodafone unit and the Airport Pharmacy unit. In his view, the Vodafone unit was in an inferior location (in Arrivals), whereas the appellant's foreign exchange bureau is just on the left at Departures, which has a huge footfall. In his view, given that the rents/licence fee would be based on turnover, this was a primary location within the airport for the appellant to be situated.

As indicated in Mr. Kyne's précis of evidence, prior to commencing the valuation of the Airport, DAA were asked to provide representative sample leases/concession licences. The DAA were also then asked to provide a list of areas which were occupied on a concession licence basis. However, this list did not include the appellant's premises. Because of this, it was assumed that the appellant was operating under some other form of lease or some exclusive licence. As a result, the appellant's property was valued on the normal basis, separately from the rest of the airport when the draft Valuation Certificate issued.

The appellant then lodged representations in relation to the subject premises. The grounds relied on at Representations Stage by the appellant were based on quantum only (i.e. valuation excessive). At no stage during Representations Stage (which lasted some six months) did the appellant advise the respondent that they held the subject property under a concession licence, although the appellant had received notification that it had been deemed to be in rateable occupation and, therefore, was not be treated as a concession licence holder. In addition, at Representations Stage the appellant stated orally that it was unable to locate the licence/lease document and was also unable to produce the passing rent on the subject property. A final Valuation Certificate was eventually issued.

At Appeal Stage, an unsigned draft concession licence was provided, though the rental figure was not available, the Bank of Ireland representative indicating that he was not able to obtain

same. While extracts from the licence in question were provided, significant parts were redacted from same (e.g. figures payable).

Mr. Kyne indicated that he did not value concession licence units individually because he had been advised as a matter of law that DAA were in paramount occupation; this was because of the control exercised by DAA over such concessionaries. He said that this advice stemmed from similar legal rulings in Great Britain and Northern Ireland.

Mr. Kyne indicated that there had been no complaint by leaseholders as to the values ascribed to the premises held under lease.

With regard to the ATMs, Mr. Kyne indicated that he had received no information in relation to the rental/licence fee paid. He had to estimate same from first principles. He looked at the Blanchardstown Shopping Centre units and came up with an estimate of €15,000 per ATM. He noted that rents went from €123,000 to €146,000 between 2005 and 2009. His initial estimate for each ATM was €30,000.

However, having now had an opportunity to consider the individual figures from 2005-2009 as supplied by Martin O'Donnell in his report, he would say that the appropriate licence figure would be 5 x €25,000 = €125,000. Insofar as the issue of methodology of valuation of ATMs is concerned, he indicated that the methodology used by him had been agreed by the Rating Forum, which he said was an association of various representatives of all the rating agents. He insisted that the ATMs had been excluded from the global valuation and that, therefore, there was no question of a double count (and in this regard pointed to the last page of the précis of Mr. Aidan Reynolds, the previous witness).

He was cross-examined on behalf of Bank of Ireland. He indicated that the Vodafone unit and the pharmacy unit were the only properties which were "*landside*". He noted that all 5 ATMs, as well as the banking hall and the foreign exchange bureau, were likewise "*landside*". He said he had been advised that DAA was in paramount occupancy of the other units and so it was appropriate that DAA be responsible for the rateable valuation in question. He indicated that he had not received the information in relation to the licence until Appeal Stage, at which stage the valuation of the airport had been concluded thereby making it impossible to include the subject premises in that valuation. He expressed the view that concession licensees were

paying rents to DAA which included a contribution to rent based on the RV/rates payable by those concession licensees, though he accepted that this was, in essence, hearsay. He indicated that the airport (which is the 24th biggest airport in the world) had to be valued overall on a contractor's basis only because one has no comparator. That was not the case in relation to the subject premises, however.

It was put to Mr. Kyne that, that having received at First Appeal the information in relation to the unsigned draft licence, the valuation could have been amended under Section 37 of the Act. However, he indicated that at First Appeal stage in a revaluation the Valuation Office had no power to rectify the exclusion of Bank of Ireland from the list of concessionaries supplied to the Valuation Office. If Bank of Ireland had provided the relevant information at Representations Stage, Bank of Ireland would have been included in the overall valuation. Bank of Ireland did participate in the Representations Stage, but, as the Valuation Office did not have a copy of the Licence Agreement, it had to assume it was not operating on a concession licence basis.

Mr. Kyne expressed the view that the rates payable would be the same, in any event, if the Bank had been included in the overall valuation, save that the rates would have been payable by the Bank to DAA who would then pay them on as part of DAA's own obligation to the relevant local authority. He indicated that as far as he was aware, all other concessionaries were operating on this basis and expressed the view that "*rent is rates in disguise*". He confirmed that the retail space in the airport is 9½% of the total square footage of the airport, though he noted that retail space in Dublin Airport is much higher than in other airports. However, he did not use rental as a basis for valuing the airport generally; he confirmed that the airport had been valued (as airports generally are) on a DRC/contractor's cost basis.

Mr. Kyne indicated that Bank of Ireland is the only bank in the airport. He indicated that turnover was an appropriate basis for measuring rent for a tenant in untried premises. If the turnover goes down, the rent can be set to likewise go down. He indicated this is often the preferred basis of fixing rent now, as a result of the downturn.

On the issue of ATMs, Mr. Kyne expressed the view that these were always valued as "*buildings*". If ATMs were freestanding e.g. in a supermarket, that would be different. What is valued is not the machine but the space. He indicated that, in accordance with the

Clydesbank decision in the United Kingdom, freestanding machines are generally excluded. However, the ATMs here had a service base behind them and it was this which was valued.

Mr. Kyne felt it would not have been appropriate to look at the "*tone*" of the airport terminal in order to value the subject premises. In his view, it was not appropriate to try to compare the rest of a terminal in an airport with a bank. There was adequate information by way of comparisons and there was, therefore, no need to compare the Bank's premises with the rest of the airport. He also indicated that there had been no increase in rates for the Bank in this revaluation compared to what had occurred on previous valuations.

On re-examination, his attention was drawn to page 9 of his précis which indicated the history of the valuation, and the failure of the appellant to provide the relevant information during the Representations Stage, which led to a separate valuation being placed on the subject property. The main airport valuation of €89,279,000 was agreed at Representations Stage. There was no mechanism under the Valuation Act, 2001 at Appeal Stage to re-open this valuation once the Final Valuation Certificate was published for the main airport valuation. Therefore, a separate valuation for the subject property, with the DAA being the rateable occupier (actual occupier Bank of Ireland), remained post-appeal. The appellant could have provided this information at Representations Stage, but it chose not to do so. Mr. Kyne submitted that the appellant could not now rely on its own failure to do so as a ground of appeal.

Mr. Kyne was also cross-examined on the issue of whether or not there had been a "double counting" of the subject premises. It was suggested to him that they had been included in the general Dublin Airport valuation. He indicated that the airport had been measured digitally and that the bank areas, including the areas for the ATMs, were measured physically and excluded. He indicated also that in the schedule to the précis prepared by Mr. Reynolds, the figure given for the site costs also excluded the banking areas, the subject of this hearing and indicated that the total area (net of the banking areas) for the purposes of the site was 18.29 acres. He accepted that the schedule in question did not show clearly how this deduction had taken place, but he made it clear that, in his view, this had occurred.

Mr. Kyne indicated there were approximately 50 or so separate valuations on the list as well as the terminal itself, which other properties were valued separately because they were held

under lease or exclusive licence. These included the Ryanair and Aer Lingus offices as well as other airline offices. In addition, basement stores which were used by the various concession licensees (for storage for stock) were also valued separately to the general valuation. Mr. Kyne indicated that both the offices and the basement stores were valued based on the rent payable under the lease (in the case of offices) or licence (in the case of basement stores) to the DAA. Mr. Kyne also indicated that Bank of Ireland could, post-Revaluation, have asked for a Revision, but confirmed that it did not do so.

The Notice Party's Evidence

On behalf of the Dublin Airport Authority (DAA), Mr. Martin O'Donnell gave evidence. He adopted his précis as his evidence-in-chief. He indicated that he had acted for the DAA in the Fingal revaluation. He was asked two years ago by DAA to tender to act for them in relation to the revaluation. It was the first time the airport had been assessed for revaluation. He confirmed that the contractor's method had been adopted for the purposes of valuing the airport. He met with the Valuation Office between January and September of 2009. In September 2009, the Draft Valuation Certificate was issued.

Mr. O'Donnell confirmed that the subject premises had been excluded from the general valuation of the terminal. DAA had been asked to provide a list of the concession licensees. All such concession licensees were what he described as "*retail units*". However, Bank of Ireland, in error, was excluded from this list. This was only discovered in September 2009 when the Valuation Office realised that the Bank had been excluded from the list.

Mr. O'Donnell confirmed he supported the approach taken by the Valuation Office in relation to the valuation of the subject premises. In his view, this was the same method as had been used for concession licensees elsewhere in the airport. In his view, the property should be valued on a "*rebus sic stantibus*" basis; i.e on the basis of circumstances as they now stand. In his view, valuation by reference to the licence fee is the best and most appropriate method to be used. The contractor's basis, on the other hand, was a valuation method of last resort.

Mr. O'Donnell suggested that the Valuation Office valuer's valuation was fair and reasonable, and accepted that his own valuation might be a little high.

Mr. O'Donnell explained the use of the 2006 figure. In his view, this reflected the licence fee payable at the time of the movement of part of the Bank from Departures to Arrivals.

It was clear from Mr. O'Donnell's evidence that at least one conversation took place between his office, on behalf of the DAA, and Bank of Ireland after the issuance of the Valuation Certificate. Mr. O'Donnell indicated he was willing to deal with the Bank in the same manner as the other concession licensees had been dealt with. There was some dispute as to whether or not Mr. O'Donnell could give evidence as to what conspired in these conversations, since it was suggested that these were "without prejudice" conversations. However, it was confirmed that there was at least one "open" discussion after the issuance of the Draft Certificate, but before the Appeal Stage, as to how Bank of Ireland had been treated by comparison with the other concession licensees. This conversation took place between representatives of Savills and a representative of Mr. O'Donnell's office. It was openly acknowledged between both parties that a difficulty had arisen and that it was necessary for the parties to resolve this.

Mr. O'Donnell expressed the view that the licence fee should be treated as being the equivalent of rent for the purposes of valuing premises, and referred to the determination in **VA01/1/020 - Edward Darcy t/a Morris Castle Limited**. He denied that the Bank of Ireland was "*over a barrel*". In his view, the Bank was in the same position as any other concession licensee who tenders for the right to occupy a particular place. In his view, the licence fee was primary "*rental*" evidence which should be used.

Mr. O'Donnell also contended that there was in effect a "*tone*" in relation to the valuation of ATMs. He accepted that the lower valuation prepared by the Valuation Office for the five ATMs, at €125,000, was closer to the mark than his estimate of €130,000. Likewise, in relation to the remainder of the subject premises, he accepted that his valuation of €1,869,663 was higher than that prepared by the Valuation Office, and was happy to accept the Valuation Office Report's figure of €1,759,000.

Mr. O'Donnell contended that the DAA had co-operated with the Valuation Office and had given the list of concession licensees to the Valuation Office in the genuine belief that it was complete. However, due to an internal arrangement in the DAA, Bank of Ireland appear to

have been dealt with by different personnel in the DAA and so were erroneously excluded from the list.

In cross-examination, Mr. O'Donnell explained he supported the manner in which the Valuation Office had approached the valuation. In his view, if Bank of Ireland had been more forthcoming at the Representations Stage, this matter would have been resolved that time.

Mr. O'Donnell indicated that it was in his client's interest that the valuation be kept as low as possible or indeed that it be struck out. However, it was his view as an expert that the contractor's method suggested by Bank of Ireland was not an appropriate method of dealing with the valuation in the instant case. Mr. O'Donnell suggested that the valuation may appear high because the placement of a bank in an airport is a primary location not just in a city, but indeed in the country. It is very different from, say, a bank being located on the main street of a town. In his view, the space in question occupied by the Bank was not a simple retail space; rather it was closer to being, in effect, an exclusive licence to operate within the airport.

Mr. O'Donnell indicated that a formula based on turnover, as opposed to a rental based on a fixed figure, gave more flexibility and thus protected the licensee. He agreed that normally one would look at a "*basket*" of rents on other properties in order to see what the appropriate rateable valuation should be. Here, however, he indicated that the property was specialised and that it was difficult to find comparators. In his view, the contractor's method was appropriate for use by large utilities (e.g. airports, fire stations) where there was no alternative evidence available in relation to the rent that might be paid.

Mr. O'Donnell accepted that it was likely that the subject premises would be incorporated into the next general valuation of the airport by the end of 2011, which would be effective for 2012. However, he felt the subject premises had to be valued as they stood now.

Mr. O'Donnell contended that it was not appropriate to pick the lowest methodology for one unit and then use that methodology to value all of the other units if those units are completely different. Likewise here, he contended that it was not appropriate to value the airport terminal on the same basis of valuation as one would value a bank. There is no "*tone*" in valuing a terminal. It is only one valuation.

Mr. O'Donnell expressed the view that neither the Vodafone unit nor the pharmacy unit had an independent existence. The document provided set out an analysis of the "*rent*" paid for the units in question and appeared to support the calculation advanced by the Valuation Office and the DAA in relation to the subject premises. However, they are not "valuations" of the two units in question; the two units do not appear on the valuation list. Rather, the "valuations" of the two units are corroborative of the views expressed by the experts in the Valuation Office and by himself in relation to the appropriate rental paid by Bank of Ireland.

Mr. O'Donnell noted that the site value, not already amended, would have to be amended to note that there was a Bank included in the site area. In his view, the site value would rise, not just because of the increased size of the area, but also because there was now a bank on it.

Mr. O'Donnell accepted that it was possible in some circumstances to use at "*bundle of methods to value a property*". However, in the instant case, he felt that the appropriate method was the licence fee rather than the contractor's cost method.

Submissions

All sides provided written legal submissions, which were of considerable assistance to the Tribunal.

Submissions on behalf of the appellant, Bank of Ireland.

(i) Bank of Ireland contended that the ATMs do not constitute "*relevant property*" as they are not "*[an] easement [or](and) other right over land*" within the meaning of paragraph 1(i) of Schedule 3 of the Valuation Act, 2001. An easement is essentially an interest held by one person over another person's land; a land owner cannot have an easement over his own land. Since the DAA is the occupier of the ATMs, it cannot have an easement over its own property, therefore the ATMs do not constitute an easement. Nor are the ATMs a "*building*".

(ii) The obligation imposed by Section 19 of the Valuation Act, 2001 is to carry out a valuation of every relevant property. Under Section 17 of the Valuation Act, 2001 each separate relevant property can be valued separately and entered as a separate item on the relevant valuation list. However, the Bank's property

was only excluded from the original general valuation of the airport through an oversight. While it is clear the subject premises will be amalgamated into the main airport valuation in 2011 for the 2012 list, it is the Bank's contention that the late submission by the Bank of the Licence Agreement was not a relevant consideration, and that the Appeal Officer was bound to consider the circumstances as they appeared to him/her and the determination of that Appeal. The Bank contends that as the Appeal Officer has conceded the argument that the subject premises would not have been treated as a separate property had the Valuation Office been aware of the appellant's Licence Agreement with the DAA, the Valuation Tribunal should exclude the original valuations of the Bank properties from the list and include them in the general valuation of the airport premises or, in the alternative, value them in accordance with the contractor's cost method used in the general valuation.

In this regard, the Bank points to Section 37 of the Valuation Act, 2001 which allows the Tribunal *(inter alia)* to allow the appeal of an appellant and amend the value of, or any other detail in relation to, the property, the subject of the appeal, or in the alternative, to exclude the subject premises from the valuation list or amend the description and valuation of the premises in question. (See Sections 37(1)(b)(i), (ii) and (iii)).

(iii) Without prejudice to the foregoing, the Bank also argued that the contractor's method is the appropriate method to be used for valuation of the subject premises; indeed this was the methodology used for valuing the rest of the airport at the time. Given the absence of comparable properties in the Rating Authority area, the Bank submits it is appropriate that this is the methodology that should be used for the subject premises which are but part of the overall premises of the airport. The Bank contends the licence fees (which are, in any event, confidential) should not be used and should not have been used to calculate the NAV of the subject premises. The Bank also contends that the licence fee, which refers to turnover rather than to the equivalent of rent paid by a tenant to a landlord, is inherently unsuitable for the purposes of valuation.

(iv) The Bank denies that the contractor's basis is inappropriate. We were referred to **VA05/2/07 - Independent Biomass Systems Limited**, which tempers any suggestion that the contractor's basis is a method only of last resort. On appeal, a relevant appellant body is entitled to use whatever method it sees fit which it deems most suitable to produce the requisite result; see **Commissioner of Valuation –v- Dundalk Gas Company [1929] IR 155**; see also **Roadstone Limited –v- Commissioner of Valuation [1961] IR 239.** The submission of the Bank is the use of the licence fee is crude and unsafe in order to fix the rateable valuation of the property.

Accordingly, the Bank submits that if the subject premises are not to be excluded altogether from the rating list, they should only be valued on the contractor's cost basis, being the basis used for the rest of the airport and on the basis which it is accepted they will be valued for the next valuation.

Submissions on behalf of the respondent, The Commissioner of Valuation.

On behalf of the Commissioner of Valuation, it was submitted that there was no evidence justifying the use valuing the Bank of Ireland premises on a contractor's cost/DRC basis as provided for in Section 50 of the Valuation Act, 2001. The DRC basis is used to value airports and is used both in the areas occupied by the DAA and the areas provided to other persons who hold under concession licences. It is not used for areas occupied under Lease, as the person in actual occupation of such areas is also in rateable occupation. Because the list of concession licensees supplied by the DAA did not include Bank of Ireland, it was assumed that Bank of Ireland was operating under a lease or exclusive licence and so the appellant's property was valued on that basis, separately from the airport rather than on contractor's cost/DRC basis used for the balance of the airport as described above.

The respondent identified three areas of concern raised by the appellant as follows:-

(i) Alleged double counting of the Bank of Ireland floor area.

The respondent contended that there was no evidence of double counting and that indeed the Schedule provided as an Appendix to Mr. Reynolds' précis made it clear that no such double count had taken place. Mr. Reynolds' contention that the site

value in the said Schedule took account of the deduction of the subject premises was not seriously challenged and, in any event, was not a matter of any great import having regard to the overall site value of 18.29 acres.

(ii) Basis of valuation.

The respondent did inform concession licensees that their valuations were included in the main airport valuation. This was to keep such retailers informed and to explain why they were only receiving a valuation certificate for any property held by such retailers under a lease or exclusive licence. It is not in issue that the subject premises were being operated in accordance with the terms of a draft licence, albeit that the appellant has not yet signed an actual concession licence; this is the reason why the name of the rateable occupier was changed from the appellant to the DAA at First Appeal stage. In this regard, the respondent noted that the draft unsigned concession licence document was first received by the respondent only at First Appeal stage. The main airport valuation had been agreed at Representations Stage.

The respondent contended there was no mechanism under the Valuation Acts in a Revaluation to re-open this valuation once the Final Certificate was published. As a result, the carrying out of a separate valuation in respect of the subject premises, post appeal, was the only option open to the Commissioner of Valuation. In this regard the respondent contended that the provisions of Section 37(1)(b)(i) allows the Tribunal on appeal, as it thinks appropriate, to allow the appeal and "....*amend the value of, or any other detail in relation to, the property the subject of the appeal as stated in the Valuation Certificate [...]*". In the instance case, however, the respondent contended that there was no "*error*" which required the Tribunal to exercise this power under the Act. The information supplied to the respondent prior to the issuing of the Certificate was accurate, albeit incomplete. In this regard, the respondent pointed to the evidence of Mr. Kyne as contained in his précis:-

> "*The history of the valuation and the failure of the Appellant to provide the relevant information during the representation phase led to a separate valuation being placed on the subject property. The main airport valuation of €89,279,000 was agreed at Representations Stage. There was no mechanism*

> *under the Valuation Act, 2001 at revaluation appeal stage to reopen this valuation once the final valuation certificate was published for the main airport valuation. Therefore, a separate valuation for the subject property with the DAA being the rateable occupier (actual occupier Bank of Ireland) remained post-appeal. The Appellant could have provided this information at representations stage, but chose not to do so. It is respectfully submitted that he cannot now rely on his own failure as a ground of appeal*".

It was submitted on behalf of the respondent that the Bank of Ireland had still not produced accurate rental figures.

The respondent noted the appellant's contention that it was entitled to be treated (and have a legitimate expectation that it would be treated) on the same basis as other concession licensees. The respondent submitted the fact that the appellant was now being valued on the basis of the rental value of the licence fee rather than on a DRC basis did not, of itself, mean that Bank of Ireland was being treated differently overall in any way that materially prejudiced it; in the view of the respondent there was no evidence of any such prejudice. In the view of the respondent it would be foolish and unnecessary to use an airport as a comparator for a Bank. Further, there are clearly available rental figures (which have a fixed baseline as well as a turnover component) which are perfectly adequate and acceptable to be used as figures to ground any rateable valuation.

It may also be noted, according to the respondent, that there is no evidence that the appellant is paying a different amount in respect of rates to that amount paid by other concession licensees, even though the payment will be due directly by the Bank to the relevant local authority.

The respondent also emphasised the conduct of the appellant. During the Representations Stage, the appellant was aware that the subject premises were being treated on the same basis as the leaseholders. At no stage during the six-month Representations period did the appellant inform the Commissioner of Valuation that this was an incorrect basis. The basis on which the appellant could contend that it had a legitimate expectation, in circumstances where the appellant had, in fact, stayed

silent throughout the relevant period, must, therefore, be unknown. As soon as the nature of the occupation by the appellant of the premises became known to the Commissioner of Valuation, the name of the rateable occupier changed.

The respondent noted that the once the works in the new terminal at Dublin were completed, there would be a revision, post-revaluation, of the airport. It has already been agreed with the rateable occupier that at that time, the subject premises will not be valued separately, provided that at the material time, it continues to be operated under a concession licence and will, therefore, be amalgamated with the main airport valuation. In essence, therefore, while the appellant is being valued separately to other concession licensees, this is only happening as a result of the lack of information provided by the appellant. In the circumstances, the appellant can have no "*legitimate expectation*" .

(iii) The respondent also noted the appellant's contention that it was inappropriate to list the ATMs in the airport separately in the valuation list. In this regard, the respondent pointed to Section 17 of the Act which expressly permits valuations of property to be entered as appropriate relevant properties even though those parts are occupied by the one person (see Section 17(2) of the Act). Further, the respondent contended that the history of the valuation and, in particular, the failure of the appellant to provide the relevant information during the representation phase led to the listing in this manner, and that the appellant cannot now complain in respect thereof. The respondent also contended that under Section 29, the Commissioner of Valuation was entitled to take into account the views of the rateable occupier (DAA). While the appellant could have made representations it chose not to do so. As a result, it cannot now rely on its own failings to justify its appeal.

Submissions on behalf of the Notice Party, DAA.

DAA drew our attention to the definition of relevant property in Schedule 3 of the Valuation Act, 2001 in which paragraph 1(a) includes "*buildings*" which defines the word "*building*" as follows:-

"*Building includes a structure, whatever the method by which it has been erected or constructed*".

According to this, therefore, the DAA submitted that the ATMs were relevant property within the meaning of Schedule 3 of the Act.

The DAA did not accept that Bank of Ireland is in a different position to other concession licensees, or that it should be valued on a contractor's cost basis.

The DAA also contended that if the Bank were correct in its submission that the DRC basis was an inappropriate one to use, the site cost used in calculations would have to be changed.

The DAA submitted that in the context of a revaluation, the power of the valuation to exclude a property from the valuation list (pursuant to sub-section 37(1)(b)(ii) of the Act) only arises in circumstances where the Tribunal determines that a property purported to be valued by the Commissioner of Valuation is not a "relevant property". It was submitted on behalf of the DAA that the "exclusionary" (sic) powers conferred on the Valuation Tribunal could not be exercised for a reason such as that contended by the appellant (i.e. that the subject premises should have been incorporated into the valuation of the airport generally) unless there was a manifest error in the making of the valuation by the respondent. Likewise, the DAA submitted that the power granted under Section 37(1)(b)(iii) is not a power giving jurisdiction to the Tribunal to amend the description of the property the subject of the appeal so as to incorporate it into the entire general valuation of the airport.

The Notice Party also submitted that the respondent was not obliged to use any particular method of valuation. In the present case, (given that in a revaluation the net annual value of a relevant property is to all intents and purposes equivalent to its open market rental value) where the open market rental value of the subject premises can be easily determined, the most suitable method of valuation is that adopted by the respondent in the instant case. The DAA contended that the use of the contractor's method is a method of last resort. To this extent, the DAA adopted the submissions of the respondent on this issue. In the circumstances, the DAA contended that the Valuation Certificate (subject to the amendment to the figures agreed upon by Mr. O'Donnell) should remain unaltered.

The Issues

The issues required to be decided upon by the Tribunal:-

(iv) Are the ATMs "*relevant property*" for the purposes of the 2001 Act?

(v) If the answer to the (i) is yes, have the subject premises already been included in the general valuation of the airport?

(vi) If the answer to (ii) is no, what is the correct methodology for valuing the subject premises for the purposes of the Act?.

(i) **Relevant Property**

Section 3 of the Act provides that "*relevant property*" shall be construed in accordance with Schedule 3 of the Act. Schedule 3 paragraph 1 includes (at sub-paragraph (a) "*buildings*" as being relevant property for the purposes of the Act. A "*building*" defined in Section 3(1) of the Act as including "*a structure, whatever the method by which it has been erected or constructed;*"

In our view, each of the five ATMs under consideration constitute a "*structure*" within the meaning of Section 3(1) of the Act as outlined above, and are thus "*relevant property*" within the meaning of Schedule 3 of the Act and are, therefore, rateable. The Tribunal notes that it was referred to three other determinations of the Valuation Tribunal (being **VA91/4/006 - Ulster Bank (Merrion Centre**; **VA02/4/067 - AIB**; and **VA01/3/076 - TSB**) in which ATMs were valued as relevant property for the purposes of the Valuation Act, 1988. While it is true that the issue of whether or not an ATM could constitute "*relevant property*" does not appear to have been raised in the course of the hearings which gave rise to those determinations, the relevant banks at no stage appeared to challenge the inclusion of the ATMs in the valuation list as being relevant property for the purposes of the 1988 Act. Perhaps more strikingly, three comparators were identified by Mr. Kyne on behalf of the respondent, being ATMs belonging to Irish Life & Permanent plc., (at Blanchardstown Shopping Centre), Ulster Bank plc., (again at Blanchardstown Shopping Centre) and Bank of Ireland plc., (at the Pavilions Shopping Centre in Swords). The appellant in this case Bank of Ireland was the occupier of the ATM in the Pavilions Shopping Centre but never challenged the inclusion of the ATM in the Pavilions Shopping Centre hearing as a "*relevant property*" for the purposes of the Act.

In all the circumstances, therefore, we are of the view that the ATMs in question constitute "*relevant property*" for the purposes of the Act.

(ii) **Double counting.**

Appendix III to the précis of evidence supplied by Mr. Aidan Reynolds of Savills on behalf of the appellant is of considerable assistance in relation to this issue. Appendix III is headed "*Dublin Airport Revaluation*". It sets out the areas included in the revaluation. However, under the heading "*excluded areas*" are a variety of areas. These are principally the stores and offices which are valued separately. At the top of this column the following words appear:-

" - *[Minus] 734.15 less stores & BOI ATMs*".

Next line in the column is:-

"*-[Minus] 527.9 less stores/offices/BOI FX & ATMs*".

The next column thereafter is headed "*Net area/m2"* and sets out the area figures after the excluded areas have been subtracted there from.

It thus seems clear that the area of the subject premises were excluded from the general revaluation of the airport.

We note also the evidence of Mr. Kyne that the area of the subject premises was also deducted from the figure for the net area of the airport when valuing the site cost of the terminal. It is true that the acreage (stated to be 18.29 acres) is under the same column heading i.e. "*net area*" column heading of the general revaluation. While there is undoubtedly no evidence from Appendix III itself showing how the subject premises were excluded from the acreage when calculating the site cost, we are prepared to accept the evidence of Mr. Kyne that the area of the subject premises were excluded from the net acreage used to calculate the site cost.

It is thus our view that the subject premises were not included in the general revaluation of the airport and no question of a "double-count" arises.

(iii) **Appropriate method of valuation**

It may be helpful to set out the two sections of the Valuation Act, 2001 which give rise to what might be described as the competing methodologies of valuation in this appeal:-

48.—*(1) The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.*

(2) Subsection (1) is without prejudice to section 49 .

(3) Subject to section 50 , for the purposes of this Act, "net annual value" means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year, on the assumption that the probable average annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes and charges (if any) payable by or under any enactment in respect of the property, are borne by the tenant.

50.—*If, in determining the net annual value of property or any part of it in accordance with section 48 , a method of valuation relying on the notional cost of constructing or providing the property or part is used, then, notwithstanding subsection (3) of that section, the net annual value of the property or part, for the purposes of that section, shall be an amount equal to 5 per cent of the aggregate of the replacement cost, depreciated where appropriate, of the property or part and the site value of the property or, as the case may be, part.*

The evidence makes it clear that prior to the commencement of the valuation of Dublin Airport, the DAA were requested to provide samples of leases and concession licenses used in the airport. There were also discussions with the section of the Valuation Office in the UK responsible for the valuation of airports in England, Wales and Northern Ireland. Discussions also took place with the DAA Retail Manager.

Legal advice was also obtained, which suggested that the DAA were in paramount occupation of the concession licences that the actual occupiers were in rateable occupation of the properties held under Lease.

As is common case, the DAA were asked to provide a list of occupiers as well as a list of the areas that were occupied on a concession licence basis. Due to an error, the appellant's premises were not included on this list. As a result, the appellant's premises were assumed to be operated by the appellant either under a lease or under an exclusive licence. The premises in question were, therefore, valued separately from the rest of the Airport.

What were described as "*Proposed Valuation Certificates*" (and what were, in fact, draft Valuation Certificates) in respect of the subject premises were issued to the Bank in September 2009, being dated the 23rd September, 2009. In both of the Certificates, the "*occupier*" was described as Bank of Ireland plc., the category of property was described as retail (shops) and the use of the property was respectively "*Bank and ATM*". The address of the property was described as "*Bank of Ireland Terminal One, Dublin Airport, Co. Dublin"* and "*Arrivals, Departures, multi-storey car park, Dublin Airport*".

The proposed Valuation Certificates which were sent to the Valuers acting for the appellant which stated "*Dear rate payer, the valuation of your property stated on the Certificate above is based on its estimated annual rental value, the specified valuation date of the 30th of September 2005. This valuation will be used to calculate your rates liability in 2010. If you are dissatisfied with this valuation or any of the details contained in the Certificate, you may make representations on the enclosed form by 20th October 2009*". The letter in question, which is signed by the Valuation Manager, also gives the name and phone number of the person to contact.

The responses filed by Mr. Kevin Carroll of Savills on behalf of the Bank to each of these proposed Valuation Certificates are dated the 19th October, 2009. These responses (which were contained in documents headed "*Representations to the Valuation Manager*" at what may be described as the "*Representations stage*" of the process) make no suggestion that the Bank of Ireland has been erroneously excluded

from the general valuation of the airport. Nor indeed do they suggest that the subject premises should be valued using a particular methodology, or why a particular methodology should be used. Instead, the representations simply contend that the "*valuation is excessive*" and sets out alternative figures for the valuation in each case. No licence agreement or any other such document appears to have been sent with the representations filed on behalf of the appellant. Nor was any other information put forward by the appellant as to why the methodology suggested by the Valuation Office might be wrong.

On the 2nd and 10th of December, 2009, final Certificates were issued by the Valuation Office in respect of the ATMs and the other bank premises, the subject matter of these appeals.

On the 8th of February 2010, an appeal was lodged by Mr. Reynolds of Savills on behalf of the appellant. Notably, the general valuation of the terminal had by this time concluded. For the first time, this appeal enclosed the Licence Agreement between the Appellant and the DAA. We are satisfied that this is the first occasion on which the existence of a Licence Agreement between the appellant and the DAA was brought to the attention of the Valuation Office. It should be noted also that the Licence Agreement in question was unsigned and appeared to be in draft form. In addition the rental figures appear to have been redacted. (The appellant believed it was entitled to redact these figures on the basis that the information in question was sensitive confidential information).

It is clear from the evidence of Mr. Reynolds and Mr. O'Donnell that some discussion took place prior to the issuing of the final Certificate in December of 2009 between the appellant's representatives and the DAA. It is clear that some sort of error had been made in relation to the non-inclusion of the appellant in the general valuation of the airport when the list of concession licensees was transmitted to the Valuation Office. However, for some reason which has still not been satisfactorily explained, the appellant did not bring these matters to the attention of the Valuation Office until after the final Certificate had been issued.

It should be noted that following the submission of the Appeal to the Valuation Office, the Appeals Officer reduced the valuation on property 305324 from €1.981 million to €1.759 million. In addition, the identity of the occupier was changed from Bank of Ireland plc. to DAA. The valuation on property 2164180 (being the ATMs) was left unchanged, though again the occupier was changed to DAA.

The comments of the Appeal Officer are of assistance. In response to the contention that the valuation was bad in law, the Appeal Officer notes as follows:-

> "*It appears from the recently submitted licence documents that Dublin Airport Authority are in rateable occupation of the bank branch and foreign exchange facility [and of the ATM]. The licence is identical to the other retail concession licence holders in Dublin Airport. In my opinion, Dublin Airport Authority retains and exercises such control over the subject property at the airport that it is not possible to regard Bank of Ireland as being in rateable occupation. Dublin Airport Authority are, in fact, the paramount occupiers of the subject property.*
>
> *We have valued the other concession holders with the main Dublin Airport valuation. This valuation cannot be amalgamated with the main airport valuation until the new Terminal 2 extension is valued later this year or next year. The licence is only in draft form and has not been signed by Bank of Ireland even though they are complying with the terms of the draft licence. This information has only been supplied at appeal stage despite earlier requests at reps [representations] stage. Requested information on rent paid by Bank of Ireland for subject property for the last number of years – request denied to date. Agent is stating that the valuation should be done on a contractor's basis even though the Bank pay a turnover rent for same*".

Thereafter appeals were lodged on the 1st of September, 2010 with this Tribunal by the Bank of Ireland. Information was sought initially by way of Freedom of Information Act and subsequently by way of discovery relating to the Valuers Report of Dublin Airport, the floor areas, the depreciated replacement cost (DRC) and site costs to be relied upon for the purpose of the valuation of the airport, as well as details

of all rents/licensee fees of similar operators of concession franchisees and any other material on which the Valuation Office purported to rely in determining the value of the subject property. The discovery sought was eventually agreed between the parties and the matter proceeded to hearing.

The Law

The primary basis of ascertaining the net annual value of a property is provided for in Section 48(3) of the Act, being "*the rent for which, one year with another, the property might, in its actual state, be reasonably expected to let from year to year* ….".

An alternative method of valuation is set out in Section 50. This allows for a method of valuation "*relying on the notional cost of constructing or providing the property or part*". Where such "*a method*" is used, the net annual value of the property shall be "*an amount equal to 5% of the aggregate of the replacement cost, depreciated where appropriate, of the property …. and the site value of the property*".

It seems reasonable to suggest even by their sequence in the legislation that the intention of the legislature was that the primary method of valuation used would be the rental, as provided by Section 48(3). The contractor's basis (or depreciated replacement cost "*DRC*") is expressly provided by the legislature as an alternative method of valuation. It may be a little unfair to suggest that the contractor's basis is a "*method of last resort*" and such an implicit criticism has been tempered in guidance notes issued by the Valuation Office in Britain; See **VA05/2/007 - Independent Biomass Systems Limited).** It seems reasonable to suggest that the contractor's basis when properly applied, is an acceptable method of ascertaining the value of properties which cannot be satisfactorily valued by other means. As noted in **VA07/2/041 - Tynagh Energy Limited** "*The contractor's basis of valuation is a hypothetical exercise based on the estimated actual cost of the property concerned*".

We note also the Judgment of the Supreme Court (Fitzgibbon J) in **Commissioner of Valuation –v- Dundalk Gas Company [1929] IR 155** where (at page 167) Fitzgibbon J held:-

> "*It cannot be laid down as a matter of law that the Judge of fact is bound to use any particular method, to the exclusion of all others, in performing the duty which is imposed upon him by the Valuation Acts (Act of 1852, Section 11), that is to say to estimate 'the rent for which, one year with another, the houses and buildings might in their actual state be reasonably expected to be let from year to year …*".

Fitzgibbon J noted the President of the High Court had cited one passage from the speech of Lord Halsbury in the case of **The Mersey Docks and Harbour Board –v- Birkenhead Assessment Committee [1901] AC 175, page 180** and he referred to another passage in the same Opinion:-

> "*That is the proposition which is put before the Parish Officers (here the Commissioner of Valuation and the Circuit Court Judge) – that is the question which they have to answer; and they are to arrive at that value, so far as I know, unfettered by any Statute as to the way in which they can do it. I am not aware of any Rule of Law or any Statute which has limited them as to the mode in which they shall arrive at it. It is not a question of law at all, it is a question of fact*".

I note also the words of **Kingsmill Moore J in Roadstone Limited –v- Commissioner of Valuation [1961] IR 239**. In the course of a masterful analysis of the origins of the valuation legislation, Kingsmill Moore J observed (at page 260):-

> "*It has been repeatedly decided that in arriving at his estimate of the hypothetical rent, a Judge is not bound to use any particular method but may arrive at his determination in whatever way is most suitable to produce the required result*". **Dundalk Gas Company –v- Commissioner of Valuation, per Fitzgibbon J at pages 167 and 168; Commissioner of Valuation –v- Dundalk Urban District Council, [1932] IR 272; per Murnaghan J at page 289.** *The ascertainment of the net annual value as directed by the Section is a question of fact and not a question of law* (**Mersey Docks & Harbour Board –v- Birkenhead Assessment Committee per Lord Halsbury at page 180**) *and commonsense and economic considerations must be the guides. To ascertain the hypothetical rent involves postulating a hypothetical tenant or*

> *tenants and a hypothetical landlord or landlords. The hypothetical tenant will consider what profits he can make out of the use of the hereditament after paying expenses and outgoings, and will not pay rents so large that it does not allow him a reasonable return; but if the demand for hereditaments of the class under consideration is large and the supply small, the rent he will pay may approximate a rack rent. If, however, the supply is large and the demand small (as is alleged with the case here), then the hypothetical landlords will compete for the opportunity of making these lettings and the tenant may be able to secure the hereditament at a much lower rent which will allow him a large margin of profit. The rent will depend upon the 'higgling of the market'.*

In the instant case, both the Commissioner of Valuation and the Dublin Airport Authority took detailed advice (including legal advice) as to how Dublin Airport might be valued. There can be no doubt but that the valuation of a public utility such as Dublin Airport is complex. Following the provision of advice (which included advice from the relevant section of the Valuation Office in the United Kingdom) various parts of the airport in respect of which DAA were in paramount occupation (including the concession licensed premises) were valued at the contractor's cost/DRC basis as provided for under Section 50.

In valuing the airport in this way, it seems to us that the Commissioner of Valuation was not only following practice adopted in the United Kingdom; it also had no choice. It is unreal to suggest that one could ever ascertain a hypothetical rent which might be paid by a hypothetical tenant or an airport. Insofar as the DAA was the occupier of the concession licensed premises, it seemed to us logical to value generally this property, in respect of which the DAA were in paramount occupation. The other properties held under lease or exclusive licence, however, were deemed not to be occupied by the DAA and were, therefore, subject to a separate valuation.

The Commissioner of Valuation contends that it was dependent on the information it received from the DAA (and in the instant case, the Bank of Ireland) before it could determine who was entitled to be treated as a concession licence holder and who was entitled to be treated as leaseholder or exclusive licence holder. The DAA accepted, quite properly, that it was due to an internal error that the DAA were not informed

that Bank of Ireland was a concession licence holder. However, what is mystifying is that when the draft Certificate was provided to the Bank in September 2009 in order to allow the Bank to make representations, no effort whatsoever was made by the Bank to inform the Valuation Office of what it contended was its true "*status*". It does appear some discussions took place between the Bank of Ireland and the DAA as to how the error which had excluded the Bank of Ireland from the original list of concession holders supplied to the Commissioner of Valuation might be resolved. We were told also in evidence that some form of without prejudice discussions took place also. The Commissioner of Valuation, however, made it clear (through the evidence on this issue of Mr. Kyne) that the position of the Bank could have been rectified and the matter resolved if proper representations had been made by the Bank as to its status during the Representations Stage prior to the issuing of the final Certificate in December of 2009.

It is thus clear that the appellant Bank had a number of months in which to articulate its position. It clearly had professional advice throughout this period and indeed its professional advisers appear to have been liaising both with the DAA and the Commissioner of Valuation.

In the circumstances, therefore, it seems to us the respondent was entitled to conclude at the time of the issuing of the final Valuation Certificate in December 2009 that the appellant being the Bank of Ireland was not, so far as the subject properties are concerned, entitled to be treated as a concession licence holder but rather fell to be treated either as a leaseholder or as an exclusive licence holder. This is not a situation where the Commissioner of Valuation failed to admit (or ignored) relevant evidence. Nor is it a situation where the Commissioner of Valuation is construed (or failed to give sufficient weight to relevant evidence which it had before it). Nor does it appear that on the evidence available to it, the Commissioner of Valuation made some sort of error of law e.g. by claiming the property in question to be rateable when in fact it was non-rateable. Based on the information available to the Commissioner of Valuation at the time of the Valuation Certificate, it seems to us the Commissioner of Valuation had no option but to deem the Bank of Ireland (so far as the subject properties are concerned) to be the equivalent to a leaseholder or an exclusive licence holder.

Having come to this conclusion, the Commissioner of Valuation utilised the annual rental value method of valuation as provided for in Section 48(3) to value the net annual value of the relevant properties for the purposes of the Act. In so doing, the Commissioner of Valuation was acting entirely consistently. The Commissioner of Valuation had used the rental value provided by Section 48(3) to ascertain the net annual value of the other leaseholder/exclusive licence holders in the airport. We heard uncontradicted evidence that the offices and basement stores occupied respectively by airlines and by retailers for storage purposes were valued in this manner. No question of using the contractor's basis under Section 50 arose in relation to those other properties. Nor was it suggested either in evidence or by way of submission that the Commissioner of Valuation in some way erred in using the rental method to ascertain the net annual value of those leaseholders/exclusive licence holder properties.

The appellant suggests that the powers of this Tribunal under Section 37 would allow it to condemn the method of valuation used by the Commissioner of Valuation and, accordingly, to amend the value of the properties, the subject matter of the appeal. We note also the appellant suggests we would have power under Section 37(1)(b)(ii) to exclude the properties in question from the valuation list; for example, if we were satisfied that some form of double-counting had taken place. However, since we have already concluded that no form of double- counting occurred, this does not arise.

Undoubtedly it is open to the Valuation Tribunal to condemn a method of valuation used by the Commissioner of Valuation if the Tribunal comes to the view that this was a wholly inappropriate methodology adopted by the Commissioner of Valuation at first instance. In the instant case, however, it appears to us that the course taken by the Commissioner of Valuation on the basis of the information before him at the time cannot be faulted. It is unfortunate in the extreme that the Appellant Bank did not take the opportunity afforded to it during the representations stage before the final Valuation Certificate issued to make its position clear.

We note also that although the original draft Certificate had been issued to Bank of Ireland, the final Certificate was issued to the DAA as the rated occupier. This is

significant because the rated occupier, being the DAA, accepts and indeed endorses the methodology suggested by the Commissioner of Valuation in valuing the properties, the subject matter of this appeal. We are, of course, unaware of and in a sense, indifferent to any arrangements which may have been entered into between the DAA and the Bank of Ireland - or for that matter, any other concession licence holders - as to how the rates levied on the DAA are to be funded by any such concession licence holders (or indeed if they are to be funded in any way at all). It seems safe to assume that some sort of commercial arrangement has been entered into between the DAA and the concession licence holders, however. Mr. O'Donnell on behalf of the DAA made it clear that it was entirely in his client's interests that the rateable valuation of all of the properties are kept as low as possible; it is feasible he would like to see the properties excluded from the valuation list. But, his clear evidence was that the appropriate method in all the circumstances here of valuing the subject properties was the rental valuation method, in accordance with Section 48(3).

In our view, the Commissioner of Valuation was correct in using the rental value method in order to value the net annual value of the properties the subject matter of this appeal for the reasons outlined above.

For the sake of completeness, it is appropriate to note the appellant's contention that the licence fee payable is a far less reliable guide than the rent which would be paid by leaseholders. The appellant contends the uncertain nature of the licence fee, containing as it does have an element based on turnover, makes it inappropriate as a methodology of valuation. In addition, as is clear from the evidence set out above, the appellant contends the Bank is in a very different position to other lessees, since it has none of the rights which a tenant would have under the landlord and tenant legislation and, in particular, none of the security of tenure which a tenant would have.

In this regard, the decision in **VA01/1/020 - Edward Darcy t/a Morriscastle Limited** is of assistance. In this case, the Tribunal were asked to consider, inter alia, the appropriateness of utilising a licence fee payable of a licensee of a tourist caravan and camping park as a method of assessing a rateable valuation. In his determination, the Deputy Chairman, Mr. Frank Malone, quotes the 10th Edition of Ryde on Rating, at page 275:-

> "*… though the rent actually paid is not the measure of net annual value, or even conclusive evidence of value at the date when the rent was fixed, if a rent payable under a yearly tenancy has been fixed recently without payment of any premium or the like, it might be taken as prima facie evidence liable to be rebutted*".

In this case (as in the **Morriscastle** case) the Licence Agreement negotiated between the DAA and the Bank of Ireland was negotiated at arm's length between two commercial entities. Here (as in the **Morriscastle** case), there is no evidence to show that the licence fee was not fixed by market forces. In **Morriscastle Limited**, the Chairman expressed the view (at page 13 of the Determination):-

> "*The Tribunal can see no reason to distinguish between licence fees and rents in this case. Ms O'Buachalla gave evidence to the effect that the Valuation Office had tended to treat them the same and she agreed with this approach .... Consequently the licence fees negotiated are in line with the rent of that a hypothetical tenant under Section 11 of the 1852 Act would have paid as every potential hypothetical tenant would have been affected by the said prohibitions [mobile homes, 24 hour a day full time security and all year round opening] and [would have] paid a rent to reflect this*".

In our view, there is no reason why the fee payable under the licence should not be used to assist the Tribunal in coming to the rateable valuation in question. The Bank appears to have been present in the airport for some 30 years already and presumably was able to assess the value of its presence in the airport at the various locations, the subject matter of this appeal in negotiation with the DAA over the licence fee. It seems to us that in accordance with the principles already referred to in **Roadstone Limited**, the use of the licence fee, thought not exactly the same perhaps as the rent payable under lease is nonetheless an entirely sensible and eminently practical figure to use to ascertain the rateable valuation of the various properties in question.

The Valuations

The rateable occupier has requested that two separate valuations be issued; one for the 5 ATMs and one for the banking hall and foreign exchange facilities. No objection is taken to this course.

(i) **The ATMs**

The ATMs are currently held on an unsigned Concession Licence Agreement by the appellant (though as previously explained, the rateable occupier is the DAA). The Rent paid by Bank of Ireland to the DAA for the 5 ATMs in 2009 was €146,000 per annum. The valuation date is, however, the 30th September, 2005. The report of Mr. Kyne suggested that the 5 ATMS should be rated at €30,000 per ATM giving a total NAV of €150,000. However, in his evidence, Mr. Kyne adjusted this figure. He noted that the rents have increased from €123,000 in 2005 to €146,000 in 2009. In his view, the appropriate estimate is €125,000, valuing each ATM at an NAV of €25,000.

On behalf of the DAA, Mr. O'Donnell suggested that the licence fee for the use of 5 ATMs in 2006 was €129,912 and, therefore, suggested an NAV of €130,000. However, he did not demur from the suggestion of Mr. Kyne as to the appropriate figure for 2005.

In the circumstances, we conclude that the appropriate valuation for each of the ATMs at a rate of €25,000 per ATM giving a total of €125,000 and, therefore, the total NAV in respect of the 5 ATMs is €125,000 and the Valuation Certificate is amended accordingly.

There is, of course, no "*tone of the list*" insofar as the Bank of Ireland ATMs are concerned within the airport. However, we note the values given for ATMs in Blanchardstown Shopping Centre and the Pavilions Shopping Centre in Swords. While these valuations are lower than those given for the Airport ATMs, we accept that the location of the ATMs at the Terminal of Dublin Airport is a premium location. It may be noted that while Mr. Reynolds on behalf of Savills for the Appellant produced a valuation based on the contactor's basis, he did not put forward any figures for the NAV of the ATMs in question based on the rental value under Section 48(3).

In the circumstances, we propose to accept the valuation put forward by Mr. Kyne in his evidence as corroborated by Mr. O'Donnell in his evidence and, accordingly, assess the NAV of the ATMs at €25,000 per ATM being in total €125,000.

(ii) **The Bank Branch and Foreign Exchange Facility.**

The Banking Hall (which was previously in Departures and is now in Arrivals) measures 445 square metres. It is adjacent to other concession retailers as well as six car hire desks. It is used by business companies as well as airport staff and travellers.

The Foreign Exchange Bureau is in the Departures Hall and is measured at 21.55 square metres. It is now in the Departures Hall across from the Aer Lingus check-in desks and is stated by Mr. Kyne to be occupying "*the most prime location within Terminal 1*".

We have been provided with figures for the licence fee payable by the appellant in respect of:-

(a) The Banking Hall; and
(b) The Foreign Exchange Bureau

between 2005 and 2009. While the Banking Hall licence fee in 2005 was €1,051,000, this rose to €1,154,929 in 2009. The licence fee paid for the Foreign Exchange Bureau was €307,485 in 2005 but this rose dramatically after 2006 (presumably as a result of the Foreign Exchange Bureau moving to the premium location of the Departures Hall) so that in 2009 the Foreign Exchange licensee fee paid was €745,621 having previously been in excess of €1,000,000 for 2007 and 2008.

It should be said that the final Valuation Certificate valued for both the Banking Hall and the Foreign Exchange Bureau together at an NAV of €1,981,000.

The rental fee for the Banking Hall Branch in 2005, according to Mr. Kyne, was €1,976,723. This would mean that the total rental for the Banking Hall and the Foreign Exchange - according to Mr. Kyne's figures - would be €2,284,208 per annum for the year 2005 (being a combination of €1,976,723 and €307,485).

However, on appeal, the valuation reduced significantly from the final Certificate to €1,759,000. It appears from the précis of Mr. Kyne that the Banking Hall in Arrivals was valued at €3,000 per square metre for the 445 square metres whereas the foreign exchange was valued at €30,000 per square metre for the 21.55 square metres in question. Mr. Kyne has also calculated the aggregate rentals per square metre in his précis which values the Banking Hall branch at €2,595 per square metre and the Foreign Exchange Bureau at €46,403 per square metre. Application of these figures would exceed the figure ultimately arrived at by the Commissioner of Valuation on Appeal. In the circumstances, both Mr. Kyne and Mr. O'Donnell (on behalf of the DAA) support the NAV arrived at for the Banking Hall and the Foreign Exchange Bureau by the Commissioner of Valuation on appeal of €1,759,000.

In the course of the hearing, there was considerable debate about the usefulness or otherwise of utilising the licence fee with a turnover component in it in order to measure the rateable valuation of the property in question. Turnover leases are usually utilised in situations where the retailer has a captive market (e.g. railway stations or airports). Such turnover rents are more directly related to the ability to pay of the individual trader who holds the licence. Turnover (and profit margin) vary and so the level of rent a tenant is able to pay can vary accordingly. Where rent was sent in the normal way at a fixed level, some licensees who enhanced the "mix" within the railway station or airport in question might be unable to pay the going rent and might be unable to trade. The use of turnover as a method of fixing rent allows the landlord or indeed the tenant more flexibility. It also gives the landlord a greater chance of obtaining an optimum licensee mix in order to maximise turnover (and rental income) as a whole.

In addition, turnover rent allow a landlord direct access to trading information which means that the landlord (being in this case the Dublin Airport Authority) will know if a part of a centre or a particular trader is performing well or badly. This allows the DAA to then respond to such difficulties without having to wait until it is too late and the retailer is forced to cease trading. Such a landlord in such a situation avoids the prospect of a "void" in the concession units in question.

It is undoubtedly the case that turnover rent is not completely free of risk since this rental can go up as well as down. However, by examining the pattern in turnover rents paid by Bank of Ireland between 2005 and 2009, it was possible to estimate a level of market value in respect of the Banking Hall and Foreign Exchange Bureau. It should be said the evidence was that the vast majority of other concession licence holders in the airport have rents based on (in part at any event) the turnover of their unit.

Our attention was drawn also to a decision of the Scottish Lands Tribunal: **Morrison EF (GP) Limited –v- Central Scotland Assessor LTS NA/2001 (reported 2004)**. In relation to turnover rents, the Scottish Land Tribunal made the following observations:-

> "*The method of calculation of rent does not, as a matter of general principle, affect the categorisation of an established level of payment for the occupation of heritable subjects as rent. Nor, in our view, does reference to the landlord's risk assist in categorising payments made under leases. No rent is completely free of risk. Rents subject to review each year will be at similar risk but would be nonetheless rents. Turnover rents might go up as well as come down ... We have to determine a rental value representative of the market rent. In many situations, a turnover rent, whether comprising the whole rent, or more commonly a small proportion added to a fixed contract rent, provides a reasonable estimate of what the market will pay. This is the way it is envisaged in the Scottish Assessors Association Report, which refers at paragraph 10.0 to base rents fixed at a level of around 75% to 80% of the full market value. As we have said, we have no difficulty in principle with the idea that market value can be established by the inclusion of turnover rent where it can reasonably be concluded on the evidence that the base rent falls short of the market value. Where there is a reasonable pattern of turnover rents establishing a level of market value above base rent, that higher level does not require adjustment*".

In our view, the methodology employed by the Commissioner of Valuation in this case is correct. The use of the licence fee is reasonable in all the circumstances as a significant factor in attempting to ascertain the net annual value of the property in

question. The figures for the Banking Hall and the foreign exchange units reflect the locations of those two units also. In our view, the appropriate NAV for the Banking Hall with an area of 445 square metres at a rate of €2,500 per square metre is €1,112,500. The appropriate NAV for the Foreign Exchange Bureau at 21.55 square metres at €30,000 per square metre is €646,500. This makes a total NAV of €1,759,000.

Determination

The Tribunal determines the NAV of the Banking Hall and Foreign Exchange facility (Property No. 305324) at €1,759,000, thus affirming the decision of the Commissioner of Valuation.

The Tribunal determines the NAV of the five ATMs (Property No. 2164180) at €125,000 in total.

And the Tribunal so determines.