

Appeal No. VA88/0/141

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

Aer Rianta cpt

and

APPELLANT

Commissioner of Valuation

and

RESPONDENT

Tedcastles Aviation Fuels Limited

NOTICE PARTY

RE: Fuel Depot, tanks, offices, stores and yard situate at Rineanna South, E.D. Clenagh, Co. Clare

B E F O R E

Hugh J O'Flaherty

S.C. Chairman

Mary Devins

Solicitor

Brian O'Farrell

Valuer

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 14TH DAY OF DECEMBER, 1989

This appeal is concerned with certain installations situate at Shannon Airport. They comprise offices, switch room, workshop, garage and small store as well as seven large tanks and four smaller tanks having a total capacity of 7,500,000 gallons.

This fuel depot was constructed in 1980 by Aer Rianta Cpt following negotiations with the Russian airline Aeroflot for trans atlantic flights. Aeroflot had previously used Shannon for this purpose. However, the high cost of western aviation fuel had forced them to use Gander as a landing airport for 1974. The deal allowed for Aeroflot to ship Russian fuel via a terminal on the Shannon estuary to the fuel tanks. The stored fuel was then used for Aeroflot trans atlantic flights, mainly to South America, but it was also used as a means for paying for airport services. This bartered fuel could then be sold by Aer Rianta. Aer Rianta installed Tedcastle McCormack as managers of the depot.

When the appeal was originally listed for hearing on the 2nd December, 1988, it was conceded on behalf of the respondent that Aer Rianta are not the correct rateable occupiers. On that occasion the Tribunal made a order that Aer Rianta should no longer be described as being in rateable occupation but made it clear that if the respondent or Clare County Council wished to bring any other party before the Tribunal and seek to have such a party listed as rateable occupiers then that should be done on notice to such a party.

The respondent duly took steps to have Tedcastles Aviation Fuels Ltd (hereinafter called "Tedcastles") brought before the Tribunal so that they might be listed as the rateable occupiers if such was the case. Tedcastles, understandably in view of what will be stated hereafter, could take with some equanimity the idea of being brought before the Tribunal for this purpose because even if they were declared in rateable occupation they were entitled to an indemnity for the payment of rates from the Minister for Tourism and Transport.

On the 24th November, 1989, at a sitting of the Tribunal, an order was made that all parties should make discovery of relevant documents and this was duly compiled with.

The oral hearing took place on the 4th December, 1989, when

Mr R. N. Cooke (instructed by Byrne, Collins, Moran, Solicitors) appeared on behalf of the appellants viz Tedcastles as well as Aer Rianta and Mr Andrias O'Caomh (instructed by the Chief State Solicitor) appeared on behalf of the respondent. Mr Eamonn Kelly of Clare County Council also attended to give assistance to the Tribunal.

Quantum was not in issue at the hearing of the appeal.

Prior to the hearing there had been a full exchange of proposed statements of evidence by the respective parties and, indeed, it appears that there is no conflict of evidence on the essential facts of this matter.

The Tribunal is particularly grateful to Mr John Burke, Company Secretary with Aer Rianta, for giving the background to the whole matter and for the help that he also afforded in his evidence in the course of the hearing before the Tribunal.

The Tribunal accepts - indeed it was not a matter of controversy - the evidence given by Mr Burke and will now set forth what he had to say.

In 1937 Aer Rianta was set up as the holding company for Aer Lingus which had been established the previous year. The main function of the company as outlined in section 80 of the Air Navigation and Transport Act, 1936 was to provide finance for Aer Lingus with the agreement of the Minister for Finance. Aer Rianta was, in effect, the shareholder in Aer Lingus.

When Dublin Airport was constructed in 1940 Aer Rianta was asked to manage it on behalf of the Minister for Industry and Commerce, the predecessor in title to the Minister for Tourism and Transport. This informal arrangement lasted until 1950 when under the Air Navigation and Transport Act, 1950, Aer Rianta was appointed as agent. Section 23 of that Act provides "for the

purposes of the management of Dublin Airport, Aer Rianta Teoranta may, unless and until the Minister otherwise directs, act as his agent."

The Air Companies Act, 1966, separated the functions of Aer Rianta and Aer Lingus by transferring the shares in Aer Lingus held by Aer Rianta to the Minister for Finance and by providing for a reduction of the share capital of Aer Rianta. As a result, Aer Rianta's main responsibility was then the management of Dublin Airport as the Minister's agent.

On the 10 May, 1968 the Minister for Transport and Power announced that Aer Rianta would be given responsibility for the management of Shannon and Cork Airports on the same basis as Aer Rianta then managed Dublin Airport. This arrangement, however, was not embodied in any statute, seemingly. It was an administrative arrangement.

All the assets at the airports continue to be vested in the Minister for Tourism and Transport. Under the Air Navigation and Transport Acts 1936-1965 and the Air Companies Act, 1966 the Minister retains full power and authority over the operation of the airports. The agency relationship with Aer Rianta is in no way intended to affect any of the Minister's powers e.g. all letting agreements are executed on behalf of the Minister in accordance with Section 15 of the Ministers and Secretaries Act, 1924.

Aer Rianta is unique among State companies in that while it is a limited company it does not own the assets which it manages or the revenue generated from those assets. All revenue collected by Aer Rianta from whatever source at the airports is due to the Minister. The annual cash surrender is settled each year in the context of the Government estimates and is included as an appropriation in aid under the vote for Tourism and Transport. Aer Rianta surrender this cash on a regular basis but all the revenue can be demanded by the Minister at any time.

Other State companies if they make sufficient profits can declare dividends which are paid to the Exchequer. In the case of Aer Rianta the cash surrendered is not by way of dividend and is not legally restricted by the level of profitability as it is the Minister who owns the cash in the first place.

Thought was given at different times to the feasibility of introducing legislation to establish an independent airport authority but this has not been done.

Mr Burke then went on to deal with the fuel farm as follows.

Historically, Shannon's primary role was as a refuelling airport for transatlantic flights to and from the U.S. from Europe and beyond. This was largely due to Shannon's strategic location on the great circle (shortest distance) between London and New York. These flights made technical or refuelling (non-traffic) landings at Shannon.

In the 1950s longer ranged aircraft were able to continue transatlantic to Europe without an enroute fuel stop which was then largely associated with westbound flights.

In the 1960s longer ranged and jet aircraft, particularly on scheduled flights, operated non-stop in both directions limiting demand for enroute fuel stops (technical landings) to long haul scheduled and charter flights where route distance exceeded aircraft range e.g. Aeroflot IL.62 and IL.86 from Moscow to Havana, Royal Jordanian 707 and later 747 from Amman to New York and to charters operating out of restricted airports such as Rome's Ciampino to New York.

Aer Rianta as agent of the Minister has responsibility for the development of this category of traffic (technical transit/refuelling) at Shannon which accounts for practically 50% of the Airport's operational activity.

Shannon Airport competed for this lucrative business with Airports on both sides of the Atlantic, namely with Prestwick and Gatwick in the U.K., and with Amsterdam, Brussels and Paris in Western Europe, and with Gander and Bangor across the Atlantic.

Shannon's traffic retention and development problems started with the fuel crisis in 1973. The situation deteriorated further with the fuel crisis in 1979. Development of new business was not possible as fuel supplies at Shannon were limited on a month by month basis to a percentage of uplift in the corresponding month of the previous year.

On this basis fuel was not available for a potential new customer who obviously had zero fuel uplift here 12 months earlier. Furthermore, retention of existing traffic was put at risk when fuel prices at Shannon became 10 to 15 cents per gallon higher than at competitor airports in the U.K. and Western Europe. (The uplift of fuel for a 747 flight is in the order of 20,000 gallons so that a 10 cents differential could add \$2,000 to an operation's fuel costs on a single flight).

In 1977 Shannon lost Aeroflot's technical transit traffic, some 200 flights per year, to Gander. The switch was made purely on cost efficiency grounds. There was an obvious considerable saving in hard currency for Aeroflot in continuing 1700 miles beyond Shannon to Gander with low cost home fuel and then using western fuel for only 2300 miles from Gander to Havana, rather than routing via Shannon where they would require Western fuel for over 4000 miles. The final consideration was the fact that Western fuel was 10 cents per gallon cheaper at Gander than at Shannon.

Aer Rianta worked on the recovery of Aeroflot's traffic by providing at a cost of over £1m, a fuel farm at Shannon -capacity 4 million gallons - for acceptance, storage and into-plane servicing of Aeroflot's fuel which they tankered to the jetty at Shannon. The fuel was owned by Aeroflot, the

farm was owned by the Minister. Tedcastle Aviation Fuels are employed by the Minister as an independent contractor to perform certain limited functions in the fuel farm.

The facility was commissioned in 1980 and from July to December 1980 Aeroflot operated 158 flights through Shannon to and from Havana. In 1981 and following years Aeroflot channelled their entire Central and South American operations through Shannon, operating each year since 1984 over 1000 yearly Shannon transits. In 1989 with the restoration of Aeroflot's U.S. services, these transits will increase by 25% with a further 10% increase in 1990.

In 1983 because Aeroflot were not in a position to pay landing fees, catering charges in hard currency, Aer Rianta on behalf of the Minister negotiated the bartering of a limited quantity of Soviet fuel at the Shannon fuel farm in exchange of these airport services. The fuel was resold to potential transit and flight crew training customers which otherwise would have been lost to Shannon due to the multinational fuel pricing patterns. For example in 1983 fuel prices at Gatwick were 10-15 cents cheaper per gallon than at Shannon. It made no particular difference to the multi-national oil companies whether airlines picked up their product at Shannon or other airports in the World. It made a major difference however to Shannon Airport.

Since 1983 Aer Rianta on behalf of the Minister has marketed Soviet fuel to the maximum allotment which will be in excess of 9 million gallons in 1989, supplemented by over 1 million gallons of Western fuel purchased in the U.K. and has in addition handled over 20m gallons of fuel for Aeroflot and Pam Am flights.

Aer Rianta on behalf of the Minister are at present suppliers to British Airways, Britannia, Dan Air, Virgin Atlantic, Novair, Air France, Lufthansa, Pan Am, TWA, American Transair, Air America and Rich International whose technical traffic or flight crew training would be lost to Shannon had the Minister's competitively priced fuel not been available.

Mr Burke referred to a number of agreements, the chief one of which was the original agreement dated the 27th September, 1983, appointing Tedcastles as the Minister's sub-contractor to operate the Minister's Fuel Farm principally to fuel Aeroflot aircraft as directed by the Minister through his agent Aer Rianta. There were some supplemental agreements changing the financial terms of the original agreement and then there was a contract of the 20th September, 1988 appointing Tedcastles as the Minister's sub- contractors to provide fuelling services to aircraft other than Aeroflot using Aeroflot fuel.

These agreements are all comprised in appendix "A" to this judgment.

Because Aeroflot fuel is insufficient to meet the airport needs Western fuel is also purchased by Aer Rianta on behalf of the Minister. Tedcastles also fuel aircraft with this fuel on an agreed basis which has yet not been formalised in terms of a contract.

The Aer Rianta fuel farm was originally built and funded by the Minister for Tourism and Transport from funds provided by the Exchequer at a cost of £1m so that Aeroflot could store its fuel there and pick it up as required. Total throughput of Soviet fuel is approximately 29m gallons, 20m gallons of which is for their own use and the other 9m is sold to other carriers. There is a barter agreement with Aeroflot under which into-plane services are provided in return for fuel.

The Jet A1 Fuel Facility was built in 1986 to supplement barter fuel sales; however it has not been in use since March 1987. Because of shortage of supply from Aeroflot the Jet A1 facility was re-introduced to operation in October 1989.

The Minister appointed Tedcastles his agent to operate, maintain and manage the fuel farm on his behalf. The Minister pays Tedcastles a fee based on fuel throughput. Tedcastles accept delivery of fuel from Aeroflot and other aviation fuel suppliers on behalf of the Minister.

Tedcastles deliver fuel into Aeroflot aircraft and other air carriers aircraft on the instructions of the Minister. The Minister supplies Tedcastles monthly with a tentative fuelling schedule which includes type of aircraft, arrival and departures etc. Tedcastles do not negotiate terms with the suppliers or users of the fuel, they merely carry out the directions of the Minister and they have no control or initiative in the running of the business of the fuel farm, they are merely a sub-contractor of the Minister.

Tedcastles have to advise the Minister each month of the amount of fuel stocks in the tanks and details of all deliveries made by Aeroflot and other aviation fuel suppliers and details of all fuel delivered into aircraft.

Tedcastles cannot make any alterations to the fuel farm without the Minister's consent.

Tedcastles are required to keep maintenance records of all the equipment in the fuel farm and make these records available to the Minister for review and inspection.

The main differences between Tedcastles and other fuel companies operating at Shannon Airport such as Esso and Shell are:-

- (i) Tedcastles do not lease the property or own the fuel tanks.
- (ii) They do not own the aviation fuel. Aeroflot fuel (including barter fuel) or Jet A1 fuel never comes into the ownership of Tedcastles
- (iii) They do not market the fuel to the airlines.

- (iv) They have no control over pricing and other policy matters.
- (v) They simply handle fuel as directed by the Minister.
- (vi) The fuel tanks cannot be used by Tedcastles for their own purposes.

The following is a detailed description of the services provided by Tedcastles on behalf of the Minister and as instructed by Aer Rianta:-

- (i) Maintain in good working order the fuelling facilities including static pipeline from jetty to storage tanks, tank complex and hydrant re-fuelling system.
- (ii) Accept Aeroflot deliveries of Soviet origin aviation fuels and reconcile deliveries.
- (iii) Carry out all sampling, testing, batching and maintaining quality control on the carrier's (Aeroflot) fuel products to their specification.
- (iv) Carry out regular stock checks and reconcile quantities taking into account normal allowance for evaporation.
- (v) Maintain suitable records and supporting documents of fuel deliveries by Aeroflot and throughput into aircraft.
- (vi) Accept deliveries of Jet A1 Aviation fuel from supply sources and reconcile deliveries.
- (vii) Carry out all sampling and testing and batching and maintaining quality control of jet A1 product to required specification.
- (viii) Carry out regular stock checks and reconcile quantities taking into account normal allowance for evaporation.

- (ix) Maintain suitable records and supporting documentation of Jet A1 fuel delivered by suppliers and throughput into aircraft of various air carriers.
- (x) Take all necessary measures to fuel Aeroflot aircraft and other air carrier aircraft in proper time in order not to delay their schedules departures.

Aer Rianta source aviation fuel product, negotiate purchase price and arrange for delivery.

Aer Rianta manage, monitor and market aviation fuels sales to all airline customers including stock control, invoicing etc.

Aer Rianta manage and monitor the throughput of all fuel.

Aer Rianta carry out, regular assessment of the fuel farm facility (tanks, hydrants, pipelines, offices, garages etc.) and also capacity based on demand and restructure accordingly to meet requirements.

Aer Rianta management and staff visit the fuel farm facility on a daily basis and review with Tedcastles all matters relating to the management and daily operation of the facility.

Valuation History

The valuation history, according to Mr Thomas D. Branigan, a valuer with 12 years experience in the Valuation Office is as follows:-

1981: Clare Co. Council requested a revision of rateable valuation at Rineanna South to take account of new fuel storage tanks erected for Aeroflot. As a result of this revision the premises were assessed at a rateable valuation of £750.00. This valuation covered both tanks and buildings. The rated occupiers were given as Tedcastle McCormack &

Co Ltd. and the property was held in fee simple. There was no appeal against this decision.

1983: Request for revision of valuation from Clare Co. Council to transfer the valuation to the distinguished lists. The grounds for this request are as follows.

Aer Rianta are a semi-state body set up by the Department of Transport to manage the state owned airports in the country. They act as managers for the Department and are as such "agents for the Minister". This has been accepted by the Valuation Office in the case of state owned airports. The same principle should apply to the fuel depot.

The Commissioner refused the request on the grounds that the limited amount of information supplied to him as regards occupation of the fuel depot did not substantiate the claim made by Aer Rianta. The fact that Aer Rianta constructed the depot and then installed a management firm to operate the business on their behalf who in turn were acting on behalf of the Minister did not, in his opinion, constitute State occupation or occupation for public purposes. He did, however, amend the occupier to Aer Rianta Teo.

This decision was not appealed by Aer Rianta.

1986: Further request for revision of valuation from Clare Co. Council to value extra tanks built in 1985. Inspection of the hereditament revealed that one new tank (750,000 gallons) and a garage, used for refuelling trucks, was constructed. This resulted in an increase in valuation from £750.00 to £800.00. This decision was not appealed.

1987: Request for revision of valuation to take account of further new tanks. There were two tanks plus a cleaning tank constructed (total capacity 1,560,000 gallons). It was discovered at this stage that information previously supplied had been incorrect and that the total storage capacity was now 7,500,000 gallons and not 5,650,000 gallons as was previously reported. The valuation was increased from £800.00 to £1,500.00 as a result of these findings.

Mr Gibney, Managing Director of Tedcastles, said that he negotiated the original agreement and signed it and was the director responsible for its implementation. It is entirely "stitched in" to the business between Aeroflot and Aer Rianta and under Clause 89, should there be a cessation or a reduction in the volume of Aeroflot traffic, then the Minister may dismiss his company. They have no business in Shannon other than to do the bidding of the Minister nor have they any aviation business outside of Shannon. They are there to perform a service under the contract. They own nothing; they built nothing and are simply paid a fee for the services they provide at the Minister's behest. And if Aeroflot decides not to fly into Shannon they "can pack their bags and go."

Submissions

Mr Cooke went through the agreement of the 22nd December, 1983 between the Minister for Transport and Tedcastles and pointed out that Tedcastles had no interest in the property as such and that they were there as part of their contractual duty and did not come within any of the recognised categories of "occupiers". He referred to the Clonmel Mental Hospital case [1958] I.R. 381.

Mr O'Caomh referred to Mr Justice Keane's book on Local Government at page 281; Carroll v. Mayo County Council [1967] I.R. 364; Cory v. Bristow [1875] L.R. 10 C.P. 504; John Laing & Son Ltd v. Assessment Committee for Kingswood Assessment Area [1949] 1 K.B. 344;

Westminster Council v. The Southern Railway Company & W H Smith & Son Ltd & Others
[1936] A.C. 511.

Findings

It seems to the Tribunal that there are only two possibilities in this case, either that the installations in question are in public ownership or they are in the "occupation" of Tedcastles.

The grounds for exemption from rates (as the Supreme Court has held in the cases of McGahon and Ryan v. Commissioner of valuation [1934] I.R. 76 and Barrington's Hospital v. Commissioner of Valuation [1957] I.R. 299 are to be found in the proviso to S. 63 of the Poor Relief (Ireland) Act 1838 -

'Provided also, that no church, chapel, or other building exclusively dedicated to religious worship, or exclusively used for the education of the poor, nor any burial ground or cemetery, nor infirmary, hospital, or charity school or other building exclusively used for charitable purposes, nor any building, land, or hereditament dedicated to or used for public purposes, shall be rateable, except where any private profit or use shall be directly derived therefrom in which case the person deriving such profit or use shall be liable to be rated as an occupier according to the annual value of such profit or use.'

It appears that the result of the "intense judicial discussion on ... a much litigated section" is that property is "used for public purposes" where, and only where -

- (i) It belongs to the government; or
- (ii) Each member of the public has an interest in the property.

Cf. Mr Justice Keane's "The Law of Local Government in Ireland", at p. 297.

The Tribunal is left in no doubt that prima facie the installations in question are the property of the State.

There is no doubt that the crucial question must always be what in fact is the occupation in respect of which someone is alleged to be rateable, and it is immaterial whether the title to occupy is attributable to a lease, a licence or an easement. See the judgment of Lord Russell of Killowen in the Westminster case [1936] A.C. 511 which was followed by Mr Justice Henchy in Carroll v. Mayo County Council [1967] I.R. 364 at 366.

The Tribunal has reached the conclusion that the Minister has not done anything to divest himself of the ownership and occupation of the installations in question. He, obviously, has to have people to carry out the necessary work. He might do this by any form of a contract; obviously, the matter is too important and too valuable to the State to be left to some form of casual contract and, therefore, there is in existence a sophisticated contract.

At the outset of this judgment it was pointed out that Tedcastles could look upon their situation with some equanimity since by reason of clause 14 of the agreement of the 22nd December, 1983, it was provided that the Minister should be responsible for the payment of rates, assessment duties etc. which would be charged or imposed by the local authority. Both sides relied upon this clause as significant. On behalf of Aer Rianta (and therefore the Minister) it was suggested that it was significant because he was making himself liable for such payments, if they arose, but on behalf of the respondent it was regarded as significant because it showed that there was a potential liability for rates. The Tribunal attaches no importance to the fact that such an indemnity is given in such an agreement as this; it is simply something that would be extracted as a bargaining factor by one side and given by the other leaving the legal consequences to be dealt with elsewhere as it happens, now, before this Tribunal.

Tedcastles cannot be regarded as being in occupation of these installations. They remain in the occupation of the State who are quite free to dictate terms and, to repeat what Mr Gibney said Tedcastles are there to perform a service and they have no purpose except to do the Minister's bidding. Accordingly, the determination of the Tribunal is that these hereditaments should be declared exempt from rating as being used for public purposes.

Because the Tribunal has found for the respondent in one appeal and against him in the other the Tribunal would propose to make no order as to costs.