

Appeal No. VA92/5/008 - 12

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

Dublin County Council

APPELLANT

and

Commissioner of Valuation

RESPONDENT

- RE: (1) VA/92/5/8 - Store at Lot No: 9C/3, Townland: Collinstown (Dublin Airport),
District of Dublin-Fingal - R.V. £20
(2) VA/92/5/9 - Duty & Tax Free Shops, Offices and Stores at Lot No: 9D/13, 9B/3,
10/2, 11/2, 13/4, Townland: Collinstown (Dublin Airport), District of
Dublin-Fingal - R.V. £8,300
(3) VA/92/5/10 - Carparks at Lot No: 25A, Townland: Corballis (Dublin Airport),
District of Dublin-Fingal - R.V. £6,043
(4) VA/92/5/11 - Carparks at Lot No: 25A, Townland: Collinstown (Dublin Airport),
District of Dublin-Fingal - R.V. £893
(5) VA/92/5/12 - Carparks at Lot No: 25A, Townland: Rock (Dublin Airport), District
of Dublin-Fingal - R.V. £2,304 Co. Dublin
Exemption - Public purposes

B E F O R E
Mary Devins

Solicitor (Acting Chairman)

Paul Butler

S.C.

Brian O'Farrell

Valuer

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 28TH DAY OF SEPTEMBER, 1993

By Notice of Appeal dated the 10th day of August, 1992 the appellants, Dublin County Council, appealed against the determination of the Commissioner of Valuation in fixing rateable valuations on the subject premises as set out above, on the following grounds:-

- (1) The true occupier of the hereditaments under appeal is Aer Rianta CPT.
- (2) Commercial activities are carried out in the hereditaments under appeal from which private profit or use is directly derived by Aer Rianta CPT and/or the Minister for Tourism & Transport.
- (3) Further grounds to be submitted.

Additional grounds of appeal were submitted to the Valuation Tribunal on the 15th January, 1993 as follows:-

- (1) The Commissioner of Valuation erred in law and in fact in determining that the hereditaments in question should be distinguished in the Valuation Lists pursuant to Section 2 of the Valuation (Ireland) Amendment Act, 1854 as being hereditaments occupied for public purposes.
- (2) The agreement between the Minister for Tourism, Transport and Communications and Aer Rianta CPT, exempting the undertaking in occupation of the hereditaments in question from the payment of rates is void as infringing Article 85 of the EC Treaty.

The Property:

The premises, the subjects of these appeals, consist of:-

- 1) A store situated on the arrivals floor of the Terminal Building.
- 2) Duty & Tax Free Shops, Offices and Stores located on the "Air Side" at Dublin Airport.
- 3, 4 & 5) Carparks provided for public use with a capacity of 3,080 car spaces at Dublin Airport.

Valuation History:

(1) Store: Pre the 1990 Revision the store was recorded as part of an office with a £30 R.V.. The occupier was entered as The State and it was listed in the distinguished part of the lists. Post Revision the issue related to store with Aer Rianta entered as occupier. The valuation was broken down as follows:-

- £26.00 - Buildings
- £50.00 - Rights over land

A rateable valuation of £20 was subsequently agreed between the Valuation Office and the Consultants and is not at issue in these proceedings.

(2) *Duty & Tax Free Shops, Offices and Stores:* Comprising Terminal Building - Shop and Store, Bonded Store, Pier B - Shop, Pavillion - Office (ground floor), Pier A - Shop and Store. The relevant dates concerning these premises are:-

November 1989: Request for Revision was submitted by Dublin County Council.

November 1990: The Revision List issued fixing the rateable valuation at £11,245 with the occupier stated to be Aer Rianta.

1st December 1990: Donal O'Buachalla appealed on behalf of the occupier to the Commissioner of Valuation and Dublin County Council also appealed the decision on the grounds that the valuation was too low and inequitable. As a result of discussions between the appellants and their agents agreement was reached with the agents on behalf of Aer Rianta on the quantum issue.

13th July 1992: At First Appeal the Commissioner altered the occupier to The State (Minister for Tourism and Transport) and entered the valuation in the distinguished column of the Valuation Lists.

10th August, 1992: Dublin County Council lodged this appeal.

(3) *Carparks:* Up to 1973 First Appeal, premises occupied by the Minister for Tourism and Transport and Aer Rianta at Dublin, Cork, and Shannon Airports were generally rateable. On 1973 First Appeal, the Commissioner entered in the distinguished column of the Valuation Lists, all the premises occupied by the Minister and Aer Rianta.

At 1990 Revision the subject premises was entered in the rateable column of the Valuation Lists with Aer Rianta CPT as occupier. The Commissioner's decision at First Appeal, issued on 13th

July, 1992, relied on the decision of Barron, J., in the High Court wherein he concluded that the Minister for Tourism, Transport and Communications could be said to be

in rateable occupation of the said hereditaments and the entry was therefore included in the distinguished column of the Valuation Lists. The quantum has been agreed with the occupier.

Written Submissions:

Written submissions were received from Mr. Dermot Loftus, County Solicitor, and Mr. Philip Murphy, Administrative Officer, on behalf of the appellant, Dublin County Council, on the 15th January, 1993 and these are appended to this judgment as Appendices '1' and '2'.

Written submissions were also received from Mr. William Walsh, B.Agr. Sc., F.R.I.C.S., with 22 years experience in the Valuation Office, and Mr. Frank O'Connor, B.Sc. (Surveying), A.R.I.C.S., of the Valuation Office, on behalf of the respondent, on the 11th November, 1992 and these submissions are attached to this judgment as Appendices '3' and '4'.

A written submission was received from Mr. Des Killen, F.R.I.C.S., I.R.R.V., Director of Donal O'Buachalla & Company, Valuers, Rating & Property Consultants, on behalf of Aer Rianta and a notice party to this appeal. This written submission is also appended to this judgment as Appendix '5'.

In their written submissions Dublin County Council stated that it had been clearly understood in the 1970's that the distinguishment of properties by the then Commissioner of Valuation would leave Dublin County Council in the same financial position because of the practice since 1874 of paying a contribution in lieu of rates. This remained the case up to and including the year ending 31st December, 1986 when the contribution represented the total annual value of property entered in the distinguished lists multiplied by the current rate in the pound. This sum was paid to the Council by the Valuation Office. Since then there has been a shortfall in the contribution in lieu of rates and this shortfall has risen every year since, until in 1992 the contribution represents one-quarter of the sum which would have been payable when the Commissioner made his decision in the early 1970's. The effect of this shortfall in the income from the contribution in lieu of rates is serious for Dublin County Council, but will be further exacerbated when the county is divided into three county councils. The newly established Fingal County Council, which includes Dublin Airport could not afford to lose three-quarters of its potential income from these and similar hereditaments.

In the submission Dublin County Council stated that it was their considered view that commercial activities were carried on in the hereditaments under appeal. In this regard, it was

essential, they said, to distinguish between management and operation of the airport. Aer Rianta is engaged in these activities in its own right, Dublin County Council contended, even though part of any surplus is payable to the Minister.

The Commissioner of Valuation, in the written submissions, stated that the matters relating to distinguishment were a matter of policy which would be argued at the oral hearing. In the written submissions, it was stated that as a result of the decision of Barron, J., in the High Court, which concluded that The State was in occupation of the subject hereditaments, the property had been entered in the distinguished column of the Valuation Lists with The State as the occupier of the premises. It was also contended that no further grounds than that raised at First Appeal could now be raised before the Tribunal.

Mr. Des Killen, in his written submission on behalf of the notice party, stated that agreement had been reached on the quantum of the valuations without prejudice to the claim that the Minister, that is The State, was in occupation and not Aer Rianta who are merely agents of the Minister. Mr. Killen stated that the decision of Barron, J., in the High Court confirmed the position of the notice party that the correct rated occupier in the subject hereditaments was the Minister and this point would be further argued at the oral hearing. He further added that grounds not submitted at First Appeal could not now be advanced before the Tribunal and looked for the Tribunal's ruling on this matter.

Further documentation handed in by the parties to this appeal are itemised and appended to this judgment.

Oral Hearing:

At the oral hearing which took place in Dublin on the 18th January, 1993 and was resumed on the 21st June, 1993 and again on the 19th July, 1993, James O'Reilly S.C. and James Macken Barrister-at-Law., instructed by Mr. Dermot Loftus, County Solicitor, appeared on behalf of the appellant.

The respondent was represented by Aindrias O'Caomh Barrister-at-Law instructed by the Chief State Solicitor.

Richard Cooke S.C. and Marcus F. Daly Barrister-at-Law, instructed by Messrs. Byrne Collins & Moran, Solicitors, appeared on behalf of Aer Rianta, a notice party to the hearing.

At the outset counsel for both the respondent and the notice party objected to the attempted introduction of additional grounds of appeal on 15th January, 1993. The Tribunal adjourned to consider the matter as a preliminary issue. Having regard to its consistently held view in this respect, the Tribunal decided that the question of possible infringement of Article 85 of the E.C. Treaty should not be considered as it had clearly not been raised on First Appeal. In relation to the remaining grounds of appeal submitted on 15th January, 1993, the Tribunal agreed with counsel for the appellant that these grounds could be said to be subsumed in the initial grounds of appeal and should be admitted on that basis.

Mr. Philip Murphy, Administrative Officer with Dublin County Council, in evidence, explained that between 1973 and 1986 the government contribution in lieu of rates would have equalled the amount due in rates, but that since 1987 there had been an increasing shortfall in the subsidy payments received from the government.

Mr. Desmond Killen of Messrs. Donal O'Buachalla & Company, Agents for the notice party, pointed out that on foot of the First Appeal, a valuation of £55 in respect of the vending machines, had been arrived at by agreement, on the basis that Aer Rianta was in occupation and the Minister was the landlord. If, however, as has since been decided in the High Court, the Minister is in occupation, obviously that easement disappeared, since it would be a nonsense to have an easement over ones own property.

Mr. Killen further stated that the valuations on the car parks and duty-free shops were agreed on a quantum basis only "without prejudice".

Mr. Brian Vaughan, Property Manager, Aer Rianta, gave evidence that since 1986 any new assets had to be financed from Aer Rianta resources, i.e. from monies which the Minister allowed to remain with Aer Rianta. He stated that the difference of £53 million approximately

between assets and liabilities was merely that, and could not be described as profits, since it belonged to the Minister.

In reply to cross-examination by Mr. James Macken, Mr. Vaughan said that retailing was an integral part of airport management, which the Minister was statutorily entitled to carry on.

He agreed that since 1986 Aer Rianta had a greater degree of autonomy and that a sum of £500,000 could now be invested in any one project, but he stressed that the Minister alone decided the amount of surrender in each year.

In reply to a question from Mr. O'Caomh, Mr. Vaughan said that the reference on Page 31 of Aer Rianta's Annual Report, to the transfer of pre 1988 assets, was merely a method of valuing these assets, as this would obviously be important in the eventuality of transfer of ownership.

Mr. John Burke, Company Secretary, Aer Rianta, said in evidence that in 1968 discussions took place in relation to the transfer of assets to Aer Rianta, but that it was decided that it was not commercially viable at that stage. He said, in reply to questions from Mr. Macken, that a change of status had been considered on several occasions but, to date, no change in status had been effected.

Again, in response to cross-examination by Mr. Macken, Mr. Burke explained that since the cost of building the new runway at Dublin Airport would have been substantial, it was decided by government that this cost should be funded by the company's resources. As the auditors had wanted to make it clear that there was no change in ownership, a letter dated 24th March, 1987 was obtained from the Minister, which letter referred to a possible future change of ownership, and also referred to a non-refundable grant. Mr. Burke explained that these monies had to be included in accounts and were written off over a number of years. The funds were shown as reserves in the accounts to prevent the situation arising under changing company law, whereby the Minister would have appeared as a massive creditor. Mr. Burke emphasised that banks lend to companies on the basis of cash generated and not on the basis of assets.

Submissions:

James O'Reilly S.C., submitted that while it was common case that the hereditaments were owned and occupied by the government, the purely commercial nature of the activities carried out therein distinguished them from the exemption referred to in Section 2 of the 1854 Act. He

referred to Mr. Justice Keane's definition of "public purposes" at Page 297 of his book, *The Law of Local Government in the Republic of Ireland*, as an over simplification. Mr. Justice Keane's definition is as follows:-

"It now seems clear, however, that property is "used for public purposes" where, and only where:

- (1) it belongs to the government; or
- (2) each member of the public has an interest in the property."

Mr. O'Reilly appeared to concede that in view of the decision of Barron, J., in the High Court, if the Minister were deemed to be in occupation of the vending machines, these could not be considered a rateable easement.

In relation to the carparks and duty-free shops, however, Mr. O'Reilly submitted that these were quintessentially commercial undertakings and not strictly governmental.

Mr. O'Reilly opened several cases, which are appended hereto as Appendix '6', *inter alia* - **Cork County Council -V- Commissioner of Public Works 1945 I.R. 561**, which, he said, supported his contention that once a state authority carries on commercial activity which cannot be said to be part of the business of government, it loses its exemption. He said that the duty-free shops in particular were accessible only to a limited group of people, viz; those on international flights.

Mr. O'Reilly quoted Section 2 of the Air Navigation and Transport Act, 1950, which he said only referred to the management of aerodromes. For the Minister to carry on commercial activities, he would need express legislative power. Mr. O'Reilly referred to the recent Mullaghmore Interpretative Centre planning case and contended that just as the planning provisions of the Planning Acts were there found to apply, so too, in the instant case, the provisions of the Valuation Acts should apply.

Mr. O'Reilly submitted that the provisions of the State Authorities (Development & Management) Act, 1993 should not apply retrospectively to a hearing already before a Court or, as in this instance, a Tribunal.

Richard Cooke S.C. objected to the introduction of the *ultra vires* argument by Mr. O'Reilly as a new ground of appeal at this stage.

Mr. Cooke submitted that the operation of aerodromes by the Minister was authorised by the constitution and by legislation and therefore fell within the definition of "public purposes".

The only thing which would take it out of this exemption would be the existence of private profit. Mr. Cooke further submitted that funds used directly by and for the government, cannot be regarded as private profit. These were monies obtained by the state through properties owned by the state and used by the state.

Section 25 of the 1988 Air Navigation and Transport Act refers to a state aerodrome "with all that is carried on within it". Mr. Cooke submitted that there was, therefore, no restriction on the activities to be carried out and that the Minister's first duty was to make the aerodrome commercially healthy.

Mr. Cooke pointed out that it would not be possible to operate a viable airport without carparks and that duty-free shops had become the norm in airports worldwide.

Mr. Cooke said that state exemption in this country was statutory, which situation was unlike that in England, where the Crown's exemption from rateability had been removed because there was no express reference to the Crown in relevant legislation.

In relation to the *Cork County Council -V- Commissioner of Public Works* case, cited by Mr. O'Reilly, Mr. Cooke submitted that the bath house in that case would have been exempt but for the fact that its users were restricted to those within a limited district.

Mr. Aindrias O'Caomh, adopted Mr. Cooke's submissions and also objected to the introduction of new grounds of appeal at this stage by counsel for the appellant.

Mr. O'Caomh submitted that the issue of occupation of the subject hereditaments had been dealt with by Barron, J., that the Tribunal was bound thereby and that there had been no further factual indication given that the High Court judgment was erroneous.

Mr. O'Caoimh accepted that the final paragraph of the judgment of Barron, J., might be important from the rating point of view, but he pointed out that the Tribunal should deal only with rateability.

Occupation by a government Minister would *prima facie* be exempt and there could be no question of private profit or use in any activity carried out by a Minister qua Minister.

Mr. O'Reilly further submitted that if the Minister were found to be acting *ultra vires*, then the profits made would be private and would remove the hereditaments from exemption.

Determination:

The Tribunal accepts the notice party's arguments in relation to the rateability of the vending machines and finds that they cannot be considered an easement, since the Minister has been held to be in occupation and cannot therefore be found to have an easement over his own property. They are therefore exempt from rateability.

The Tribunal is bound by the decision of Barron, J., in the High Court. The government has been found to be in ownership and occupation of the subject hereditaments.

What remains to be decided by the Tribunal are the following questions, viz:-

- (a) Can private profits be said to arise, thereby removing the hereditaments from exemption under Section 2 of the 1854 Act?
- (b) Does the management of an aerodrome extend to duty-free shops and car parks?
- (c) The admissibility of the *ultra vires* argument as a new ground of appeal.
- (d) The retrospective nature of the State Authorities (Development and Management) Act, 1993.

The duty-free shops and car parks are obviously commercial and successful but that does not *per se* indicate private profits. The ultimate destination of these monies is entirely at the discretion of the Minister. In any event, the profits are largely irrelevant for rating purposes, and for any unusual emphasis to be placed on the size of the profits generated by the subject properties begs the question that if they were commercially unsuccessful, would they be considered any less rateable?

While there is no doubt that the Minister derives profits, this does not of itself remove the hereditaments from the scope of exemption. These profits are obtained by the state and flow directly to the benefit of the exchequer. What the agent retains is decided solely by the Minister.

The success of the enterprise must not be taken into account in determining the question of exemption from rateability. It seems obvious that the Minister has a public duty to do everything possible to ensure that the operation is run as successfully as possible.

The evidence given in relation to the several occasions when a change of status of the agent company was discussed at government level, is a convincing indication of the current public nature of the occupation of the properties.

The Minister for Tourism and Transport is empowered by legislation to manage aerodromes "with all that is carried on within". There is no doubt that an aerodrome in the 1950's was far removed from that of today.

Commercial travel like all other modes of travel, must of its very nature be dynamic and a modern airport must, in order to remain competitive with its international peers, include many ancillary activities in accordance with public demand.

While an airport could, of course, function without car parks and duty-free shops, it would not be thus managed to its optimum extent. It is the opinion of the Tribunal that the Minister has a duty to the State, to ensure that the airport which he owns and occupies through his agent, is run in such a way as to ensure that its full potential is exploited.

The duty-free shops and car parks would therefore seem to be an integral part of a modern aerodrome.

Until such time, if any, as legislative change may alter the status of Aer Rianta in relation to the assets of the company, the ownership and occupation of the subject hereditaments with all that they entail, remains vested in the government.

In the light of the above, the Tribunal need not consider the questions of admissibility of new grounds of appeal or the retrospective nature or otherwise of the State Authorities (Development and Management) Act, 1993.

Accordingly, in view of the circumstances and all the evidence adduced, the Tribunal hereby affirms the decision of the respondent in respect of each of the hereditaments, the subjects of these appeals.

APPENDICES

- 1) Written Submissions
"Additional Grounds of Appeal" dated 15th January, 1993 from Mr. Dermot Loftus, Solicitor for Appellants, Dublin County Council
- 2) Written Submission received on 15th January, 1993 from Mr. Philip Murphy, Administrative Officer, Finance Department, Dublin County Council
- 3) Written Submissions dated 11th November, 1992 from Mr. William Walsh, Valuation Office
- 4) Written Submission dated 11th November, 1992 from Mr. Frank O'Connor, Valuation Office
- 5) Written Submissions from Mr. Desmond Killen of Donal O'Buachalla & Company Limited on behalf of Aer Rianta, a Notice Party to the Appeal - dated 7th January, 1993
- 6) Legal Authorities relied on by Appellants - Volume 1 & 2 dated 15th January, 1993
- 7) Extracts from Statutory Authorities - Volume 1 & 2 dated 15th January, 1993 - submitted by the Appellants
- 8) Extracts from Relevant Textbooks dated 15th January, 1993 - submitted by Appellants
- 9) Statutory Instrument No. 1 1993 - State Authorities (Development and Management) Act, 1993
- 10) Letter to Department of Communications from Mr. Donal Geaney, Stokes Kennedy Crowley & Company relating to the accounts of Aer Rianta - dated 13th March, 1987
- 11) Aer Rianta Annual Report and Accounts, 1991

- 12) Letter from Commissioner of Valuation to Dublin County Council dated 24th May, 1971 concerning distinguishment
- 13) Finance Act, 1946
- 14) Sixth Joint Committee on Commercial State Sponsored Bodies - Seventh Report - Aer Rianta, dated 3rd November, 1992