Appeal No. VA96/6/002

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 1988

VALUATION ACT, 1988

O'Brien & Binchy, Solicitors **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Offices at Map Reference 8, 9, 10b (including 7, Nelson Street), New Quay, Townland: Clonmel East, Ward: Clonmel East Urban, U.D., Clonmel, Tipperary S.R.

B E F O R E

Liam McKechnie - Senior Counsel **Chairman**

Ann Hargaden - FRICS.FSCS **Member**

Barry Smyth - FRICS.FSCS **Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 8TH DAY OF JUNE, 2000

By Notice of Appeal dated the 2nd day of December 1996, the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £125 on the above described hereditament.

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

1. Revised valuation is based on an excessive appraisal of the letting value or net annual letting value.

2. Account was not taken of the fact that the premises cannot benefit from tax or rating reliefs under the Urban Renewal Scheme.

3. Revised valuation does not take account or adequate account of values and valuation must be determined accordingly.

4. Adequate regard has not been give to ongoing and prospective maintenance costs with particular reference to damp and dry rot.

5. The revised valuation in inequitable as compared with valuations of similar premises.

Oral Hearing

This appeal was heard by way of two oral hearings, which took place in Clonmel over two days proceeded by way of an oral hearing which the appellants were represented by Mr. Binchy of that firm. Mr. P.F. Quirke of P.F. Quirke & Co Limited, Auctioneers, Valuers and Estate Agents and Mr Garry Gleeson of Garry Gleeson & Associates, specialists in building defects and restoration both gave evidence on behalf of the appellant firm. Mr. Denis Maher, District Valuer with the Valuation Office appeared on behalf of the Commissioner. Having taken the oath both valuers adopted as their evidence in chief their respective written submissions, which previously had been exchanged and received by the Tribunal. From all the evidence tendered the following facts, in respect of which there was virtually no dispute, emerged as being material to this appeal

The Property

The property is situated on the corner of Nelson Street in New Quay in Clonmel. Nelson Street links Parnell Street with new Quay and has a variety of mixed users including the recently refurbished Court House. The Quay forms the northern bank of the River Suir and runs from Angelsea Street to Joyce Lane to the west and the buildings thereon are occupied primarily by office and domestic users.

The property comprises a three-storey office building together with single storey extensions to the side and rear and two small yards currently in use as car parks. The entire occupies a site of about a quarter acre. It also incorporates a three storey stone building in ruins and a single storey storage shed to the rear. Accesses to the buildings are available from both New Quay and Nelson Street.

The construction of the main period building is of rendered rubble masonry walls under a pitched slate covered roof and timber floors. The single storey extensions at the rear and side are new and are constructed with concrete block walls and slate roofs. The Appellants estimate of the net lettable area was in the region of 4,100 sq. ft., whereas the Respondent's net usable floor area amounted to about 4,500 sq. ft. of which total office space was 4,250 sq. ft. The Appellant indicated that this was due to slanting walls throughout the premises. As no agreement was reached on this fact, we have accepted the Respondent's accommodation as follows:

Ground Floor Offices	1,780 sq. ft.

Reception	330 sq. ft.
Safe	60 sq. ft.
Canteen	118 sq. ft.
First Floor Offices	1,058 sq. ft.
Store	32 sq. ft.
Second Floor Offices	1,082 sq. ft.
External Store	1,139 sq. ft.

Building in ruins not included in the above listed accommodation.
There is also a car park attached.

Valuation History

The property was the subject of an annual revision in November 1995 when the valuation was fixed at £145. This was subsequently appealed and the valuation was reduced to £125 in November 1996. It is this £125 R.V. valuation which is the subject of this appeal.

Issue Between the Parties

The Appellant confirmed that the property had been substantially refurbished prior to the revision including renewal of the slate roof and new floors throughout. Expenditure on structural works amounted to about £150,000. Mr. Garry Gleeson gave evidence to indicate that there was substantial damp penetration and wet and dry rot evident in the building when he inspected in October 1996. The Respondent claimed that this was not evident as of the valuation date on 10th November 1995 and that there was no external evidence at first appeal and therefore the property should be valued as it stood at that date. Evidence was also given on rental values in the area and the quantum was also therefore in dispute.

In relation to quantum, Mr Quirke gave evidence that there was a significant amount of surplus space in 1995 and designated office properties attracted considerably greater interest than non-

designated office properties. He indicated that the market was limited for the size of the subject property and that 3,600 sq. ft. of space available in Angelsea Street was unlet for three years quoting £18,000 per annum. He stated that this latter space was designated space and this had a huge bearing on the rent that the hypothetical tenant would be prepared to pay. He stated that between 38% - 45% of enquiries required designated properties only and that the building would have been difficult to break into smaller units because of the stairwell and fire escape. He indicated that if he were advising a potential tenant he would recommend that a structural survey be completed and that this would make a difference of between £1,500 to £2,000 per annum to the rent. He arrived at a net annual value of £16,000 and indicated that if you were to disregard the dampness problem that the figure would be more likely to be in the region of £17,500 to £18,000 per annum. He stated that the dampness was a small problem in 1998 and that it was highly unlikely that it was there in 1995. He agreed with the respondent's assessment on the car park and store at £2,139 per annum but stated that the office building should be assessed at £4 psf overall.
He mentioned the fact that Clonmel had been subject to three major floods on the Quay since 1996. He felt this would have an adverse affect on any company locating there.

Mr. Maher on behalf of the respondent gave evidence of several comparisons, which are attached as Appendix One to this judgment. He indicated that the subject property was probably one of the best privately owned and occupied office buildings in Clonmel with a prominent corner position and two entrance doors and subsidiary entrances from the parking areas making it suitable for either single or multiple occupancy. He indicated that rents appeared to run at between £4.50 to £6.00 psf depending on size and location within buildings. Mr Maher also commented on the flooding in Clonmel in recent years, and indicated that he felt that this was not relevant, as he was not so sure that the hypothetical tenant would be appraised of this when one considered the limited number of times it had occurred in Clonmel. He indicated that he had valued the property as a single hereditament and had valued it fairly.

Determination

The valuation date of the property is November 1995. That is the date upon which our

determination has to refer to. In considering the issue of dampness and dry rot one has to apply the principles in emerging in a line of authorities to the present day and referred to in the decision of *John Pettitt & Company Limited –v- Commissioner of Valuation*, judgment issued on the 13th October 1997. The principle, which is of a procedural nature, is designed to ensure that at first appeal before the Tribunal stage, all of the relevant issues and grounds of appeal are raised and pleaded. This to make certain that the appeal valuer takes such matters into account. That the decision of the Commissioner of Valuation is comprehensive in that regard and overall to underpin the integrity of the appeal system. At paragraph nine of the judgment in John Pettitt & Son, this Tribunal said the following;

> *"On the precise issue as raised in this first submission the Supreme Court has given a number of decisions including that in the case of* ***K.D. (otherwise C.) –v- M.C. [1985] I.R. 657****. In that case, the facts of which are not relevant, the Chief Justice at p701 of the Report said:-*
>
> > *"it is fundamental principle, arising from the exclusively appellate jurisdiction of this Court in cases such as this that, save in the most exceptional cases, the Court should not hear and determine an issue which has not been tried and decided in the High Court. To that fundamental rule or principle there may be exceptions, but they must be clearly required in the interests of justice. This case can not, in my view, however provide such an exception".*
>
> *In applying that principle the Supreme Court has permitted parties to raise before it, issues which had not been raised in the Court below for example the Constitutional validity of a statute* ***(O'Shea –v- DPP [1988] I.R. 655)****, and an issue as to whether or not a statutory instrument was ultra vires the power of the rule making person.* ***(Harvey –v- Minister for Social Welfare, Supreme Court, 10/05/88).*** *See also* ***O'Keefe –v- O'Flynn Exhams & Partners Supreme Court, 26/07/93****. There are, it should be said, several other such decisions. Some permitting the raising of a new ground whilst other rejecting it. The test in all cases is whether, given the importance of the issue on the one hand and the rights of the Respondent on the other, it is, in the*

interests of justice, desirable or necessary to permit the amendment. In all such cases, it is for the Court or Tribunal to make the decision and for the moving part to discharge the onus of proof.

In addition one has to consider the rule known as the *rebus sic stantibus* rule. This is a principle of substantive law and it simply means that the hereditament must be valued as it is. The principle was stated judicially by Lord Wilberforce in the case of Dawkins (Valuation Officer) –v- Ash Brothers and Heaton Ltd. which is a decision reported in [1969], 2AC 366 as follows;

"*The principle that a property must be valued as it exists at the relevant date is an old one certainly older than the Parochial Assessments Act 1836. It has been spelt out in modern terminology in a certain number of cases and in passages, which have been cited. The principle was mainly a device to meet and it does deal with, an obvious type of case where the character or condition of the property either has undergone a change or is about to do so: thus, a house in course of construction can not be rated: nor can a building be rated by reference to changes which might be made in it either as to its structure or as its use".*

In addition at paragraph 270 on Ryde on Rating the authors, having quoted a number of authorities in support of the following propositions, list the propositions in regard to the *rebus sic stantibus* rule as follows:

(a) *That the true principle according to which the value of the occupation to the hypothetical tenant contemplated by the Parochial Assessments Act is to be estimated, is to assume the continuance of those circumstances which constitute the value to the existing occupier, unless it be made to appear that those circumstances are about to undergo a change.*

(b) *Although the tenant is imaginary the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made and*

(c) *There was thus a hypothetical tenant and a hypothetical rent but I think a real and concrete hereditament: ……. the hypothetical rent which the tenant could give was estimated with reference to the hereditament in its actual physical condition (rebus sic stantibus) and a continuance of the existing stage of things was prima facia to be presumed.*

And finally there is a further passage in the Dawkins decision again given by Lord w Wilberforce whereby he said:

> "B*ut it would surely be unreasonable to suppose that the hypothetical tenant is so inescapably imprisoned in the present that no anticipation is permitted of what is to come. Whether the test is what would influence his judgment or what intrinsic qualities the hereditment possesses, any occupier in real life has to ascertain and to consider whatever may make his tenancy more or less advantageous over the period for which he takes it. I appreciate that the statutory hypothethesis as to the length of the tenancy may have a bearing on what the tenant may take into account shortly ……. but apart from this it would seem clear that any occupier would take into account not only any immediately actual defects or disadvantages …….but disadvantages or advantages which he can see coming".*

In applying these principles it seems to us that this is a case more directly concerned with the substantive point rather than a procedural one. It is not akin to a situation whereby the fact, event or circumstance known to exist at the valuation date was not made or pleaded at first appeal stage. This through inadvertence, mistake or otherwise. Equally so it is not again where the fact though existing was not known but could be discoverable by reasonable enquires. Rather the matter at issue would appear to focus on whether or not at November 1995 the property was indeed afflicted by the dry rot, dampness etc. as is suggested. If it was, then the principle of *rebus sic stantibus* would apply and whatever adverse consequences that would have for its letting value would have to be determined by this Tribunal by evaluating the evidence so given.

In our opinion we are not satisfied that the appellant has discharged the onus of proof in this regard. Whilst Mr. Gleeson observed such dampness in October 1996 neither did he or any other person give evidence as to the condition of the premises in November 1995. Indeed, as is stated above, Mr. Quirke felt that in November 1998 the dampness was a small problem and that in all probability did not exist as at the valuation date namely in November 1995. It should be said that the function of this Tribunal is not to decide on a *lis* between the parties and accordingly though our findings are relevant for the purposes of our determination in this case they should not be taken as having any influence in any private ajudication either pending or contemplated between any parties arising out of the subject matter of this appeal. Accordingly, it seems to us to be clear from the evidence given, that evidence of dry rot and rising dampness was not apparent to the well-trained eye as at the valuation date and that the property appeared to have been fully refurbished. There is no doubt therefore that we should not in our opinion take this matter into account in coming to our conclusion.

That being the case we are of the opinion that the office market in Clonmel was not buoyant as at the valuation date. There was an over-supply of space on the market and the main demand was for designated property. The subject building is a prestigious property well located within the town and the demand would have been reasonable as a single hereditament, provided the rental levels were competitive. Therefore, in our view, the appropriate rental level at the valuation date was as follows:

Offices	4,250 sq. ft. @ £5 psf	=	£21,250
Safe/Stores/Canteen	210 sq. ft. @ £2 psf	=	£ 420
External Store	1,139 sq. ft. @ £1 psf	=	£ 1,139
Car-park	1,000 sq. ft. @ £1 psf	=	£ 1,000
			£23,809
	Say	**=**	**£24,000**
	@ 0.5%	**=**	**£120.00**

Say £120 RV

And we so determine.