Appeal No. VA96/6/012

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 1988

VALUATION ACT, 1988

Telecom Eireann **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Offices, Stores and Yard at Map Reference 29a (incl. 10B King Street), Thomas Street, UD: Clonmel, Co. Tipperary.

B E F O R E

Liam McKechnie - Senior Counsel	**Chairman**
Fred Devlin - FRICS.ACI Arb.	**Deputy Chairman**
Rita Tynan - Solicitor	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 14TH DAY OF SEPTEMBER, 2000

By Notice of Appeal dated the 6th day of December 1996, the appellant company (now known as Eircom) appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £400 on the above described hereditament.

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

"1. The valuation is excessive and inequitable.
2. The valuation is bad in law."

This appeal proceeded by way of an oral hearing, held in Dublin on the 26th May 2000 at which the appellants were represented by Mr. Maurice Gaffney S.C., Mr. Owen Hickey B.L. instructed by Dr. E.G. Hall, Company Solicitor. Mr. Alan McMillan of GVA Donal O'Buachalla gave evidence on its behalf. The Commissioner was represented by Mr. Mark Sanfey B.L., instructed by the Chief State Solicitor. The appeal valuer Mr. Denis Maher (District Valuer) was present as was Mr. Paschal Conboy District Valuer in the Valuation Office who gave evidence. In accordance with practice, the parties had, prior to the commencement of the hearing, exchanged their précis of evidence and in addition had submitted to this Tribunal, other documents passing between them. Having taken the oath Mr. McMillan adopted his said respective précis as being and as constituting his evidence in chief. Mr. Conboy gave evidence on behalf of the Commissioner, both were cross-examined. Submissions were made and judgment reserved.

2. Having agreed an N.A.V. of £72,000 in respect of the above described hereditment, the only issue remaining in this appeal is whether or not the application of 0.5% as the reducing factor in the relationship between net annual value and rateable valuation is valid and is in accordance with law.

3. Under Section 11 of the Valuation (Ireland) Act 1852, the valuation of houses and buildings

> "*shall be made upon an estimate of the net annual value thereof; that is to say, the rent for which, one year with another, the same might in its actual state be reasonably expected to let from year to year, the probable average annual cost of repairs, insurance, and other expenses (if any) necessary to maintain the hereditament in its actual state, and all rates, taxes and public charges (if any), (except tithe rentcharge) being paid by the tenant"*.

4. As can be seen from the clear and unambiguous wording of this section a rateable valuation should equate with an estimate of the net annual value having taken into account the other factors therein mentioned. However, for several years, indeed for

several decades, this has not been the case. Instead a practice grew up whereby the rateable valuation of any hereditament was effectively determined as a fraction of the N.A.V., this to take account of and to accommodate growing inflation. As a result and in order to achieve this purpose valuations were established by reference to comparisons with other similar hereditaments. A change to this practice was imposed by statute in 1986.

5. Section 5 of the Valuation Act 1986 reads as follows:

(1) *"Notwithstanding section 11 of the Act of 1852, in making or revising a valuation of a tenement or rateable hereditament, the amount of the valuation which, apart from this section, would be made may be reduced by such amount as is necessary to ensure, in so far as is reasonably practicable, that the amount of the valuation bears the same relationship to the valuations of other tenements and rateable hereditaments as the net annual value of the tenement or rateable hereditament bears to the net annual values of the other tenements and rateable hereditaments.*

(2) *Without prejudice to the foregoing, for the purpose of ensuring such a relationship regard shall be had, in so far as is reasonably practicable, to the valuations of tenements and rateable hereditaments which are comparable and of similar function and whose valuations have been made or revised within a recent period".*

6. This section, to include both sub-sections, was judicially dealt with in the case of Irish Management Institute –v- Commissioner of Valuation 1990 2 I.R. 409. In the most authoritative judgment on the section to date, Mr. Justice Barron commencing at page 412 of the Report made a number of significant observations, which in their entirety merit repetition herein. He said,

"*The basic approach to the determination of valuations of rateable hereditaments for the purposes of the valuation code is to be found in s. 11 of the Valuation (Ireland) Act, 1852. It requires a determination as a question of fact of the rent, which a hypothetical tenant*

would pay for the hereditament taking one year with another. There is no one way in which this issue should be resolved. See Roadstone Ltd. v. Commissioner of Valuation [1961] I.R. 239.

Under the provisions of s. 11 of the Act of 1852 the valuation was required to be fixed at the figure so found for the net annual value. As the years went by valuation ceased to be made at such figure essentially because of inflation. Instead valuations were determined upon the basis of comparisons. This fact has largely been accepted by s.5 of the Act of 1986. That section is as follows:

"(1) Notwithstanding section 11 of the Act of 1852, in making or revising a valuation of a tenement or rateable hereditament, the amount of the valuation which, apart from this section, would be made may be reduced by such amount as is necessary to ensure, in so far as is reasonably practicable, that the amount of the valuation bears the same relationship to the valuations of other tenements and rateable hereditaments as the net annual value of the tenement or rateable hereditament bears to the net annual values of the other tenements and rateable hereditaments.

(2) *Without prejudice to the foregoing, for the purpose of ensuring such a relationship regard shall be had, in so far as is reasonably practicable, to the valuations of tenements and rateable hereditaments which are comparable and of similar function and whose valuations have been made or revised within a recent period".*

The section does not alter the fundamental basis upon which valuations are made, i.e. – what the hypothetical tenant will offer on the basis of taking one year with another. What it does is to recognise inflation and to seek to keep a proportion between valuations and annual values after taking inflation into account. Sub-section 1 provides that as between any two rateable hereditaments, "as far as is reasonably practicable", there should be the same proportion between what the hypothetical tenant will offer for each and their respective valuations. The sub-section is seeking to establish an overall ratio between

annual letting values and valuation. This overall ratio will alter with inflation since annual letting values will alter with inflation while valuations remain the same. It was the gap caused by failure to provide the satisfactory mechanism for these circumstances in earlier legislation which s.5 of the Act of 1986 was intended to fill. Notwithstanding this general intention, sub-section 2 recognises that the overall ratio may differ as between rateable hereditaments of different function for example as between offices on the one hand and, say, shops on the other.

Sub-section 2 is not a provision standing on its own. What is being sought is an overall proportion between hypothetical rents and valuations. This must be borne in mind when applying its provisions. What must be considered are valuations which:-

(a) are comparable,
(b) relate to tenements and hereditaments of similar function and
(c) have been made or revised within a recent period.

Where there is evidence under each of these headings sufficient to obtain the relevant proportions then the valuations can be determined by reference to the sub-section alone. Where the evidence is insufficient, then the overall proportions predicated by sub-s. 1 must be adopted. In each case, the sufficiency of the evidence is a matter for the tribunal".

7. From this unavoidably lengthy passage the following we feel, can be stated as a summary of the situation:

(a) The basic approach, notwithstanding Section 5, to the valuation of houses and buildings is that as contained in Section 11 of the 1852 Act, namely the ascertainment, as a matter of fact of what rent a hypothetical tenant would pay for the hereditament in question bearing in mind the deductions therein noted.

(b) Under this said Section 11 the rateable valuation was to be the equivalent of this estimated rent,

(c) This formula, if it ever applied, ceased to exist many years ago and in its place, in order to reflect inflation, the comparative method of valuation was adopted. See *Roadstone Ltd. –v- Commissioner of Valuation 1961 I.R. 239,*

(d) Section 5 simply gave statutory recognition to what had been the *de facto* position for so long, that in all probability, there are no rateable valuations extant in this country which are equivalent to the N.A.V.,

(e) The essential aim of Section 5 was to recognise and take into account inflation and to keep a proportion between valuations and annual letting values. This, in so far as it was reasonably practicable to so do.

(f) Sub-Section 2 however recognised that this overall relationship may differ between rateable hereditaments of different uses or functions.

(g) Sub-Section 2, could in certain circumstances provide the answer itself in that, if there was evidence of rateable hereditaments, which were comparable, of similar function and had recently been revised, then that may be a sufficient evidential base in itself to establish the required relationship, otherwise reference must be made to the overall proportions as envisaged by Sub-Section 1.

(h) Sub-section 2. is related to and cannot be divorced from sub-section 1. And by the use of such words as “regard shall be had to…….”, it would appear that the sub-section is mandatory in requiring consideration and,

(i) Finally in all cases the sufficiency of the evidence is a matter for this Tribunal.

8. Before embarking upon a consideration of the evidence tendered in this case there are a number of other matters, which require consideration:

(a) Both in writing and verbally, the appellant company, on a number of occasions, voiced its concern about the difficulty and delay in obtaining from the Commissioner what it believed was all relevant information necessary to this appeal. Whether or not that view is justified in this case is not now a matter of importance, but lest there be any doubt about our view this Tribunal repeats and reaffirms the relevant passage, with regard to the provision of information and supply of documents as contained and set forth in the case of *Irish Shell Limited – v- Commissioner of Valuation – VA95/1/055*. Having made this observation it is also however necessary to say that deficiencies in the supply of information or the furnishing of documents cannot, in the absence of orders made at the interlocutory stage be held sufficient in their own right to afford to an appellant, any substantive relief,

(b) As appears from a portion of the evidence hereinafter recited, the Commissioner carried out what was described as a general revision in Clonmel in 1995. He did not at that time carry out any analysis of the relationship between rateable valuations and net annual values. This omission has been criticised by the appellant, who in turn has effectively sought an order from this Tribunal directing the Commissioner to make good that deficit. In our opinion it would not be possible for us to even entertain let alone make such an order. Under the Valuation Act 1988, and in particular Section 2(2) this Tribunal, being statutory in origin and having only the powers, duties and responsibilities thereby conferred on it, has jurisdiction to hear and determine appeals under Section 3. Accordingly it could have no wider powers and thereof no competence in relation to this request. As to whether an application could be made to Court either in the form of a declaratory order or by way of judicial review seeking an order of mandamus is a matter upon which we make no observation and express no view.

(c) Under Section 23 of the 1852 Act, the Valuation List signed by the Commissioner "*shall be deemed to be prima facia evidence of the correctness of the valuations contained therein till the contrary be shown to the court….*" That section was repealed in its entirety by the 1988 Act with the result that the "*presumption*", formally applicable to such a list no longer applies. This deletion however simply removes an evidential advantage but, in our opinion, it does not otherwise affect the manner and way of hearings before this Tribunal or the respective obligations on the parties thereto. In particular it does not we feel interfere with the onus of proof.

(d) At the commencement of this hearing it was conceded on behalf of the appellant company that the onus was on "he who asserts" and since the validity and correctness of the Commissioner's approach was under challenge the obligation was upon the ratepayer to demonstrate its invalidity.

(e) Again, as will be seen later in this judgment the practice of applying in this rating area, a reducing factor of 0.5% has been in existence since first appeals were dealt with in 1989. That this should be so is of course something that this Tribunal would have taken into account as a matter of weight but we also remain mindful of what a different compliment of this body said in *Irish Shell Limited –v- Commissioner of Valuation – VA97/4/001* where at page 7 it is stated "*a practice, even if general and approved, could never be a successful defence to what otherwise would be a non-observance of or a failure to comply with the statutory provision. The mandatory compliance with such requirements must at all times take precedence over a practice if there should be any conflict between them. Otherwise the decision maker would be abandoning, to a code of practice set and followed by others, its duty and obligation to statutorily perform*".

(f) Finally, a decision in favour of the appellant on the issue before us, cannot have a consequence, for example similar to that which applies if there should be a non-compliance with Section 3(4)(a) of the 1988 Act. As the appellate body charged

with the responsibility of hearing and determining appeals we must do this even where the evidence is both unsatisfactory and incomplete. It is only where the state of the evidence is such as to make it impossible to apply Section 5 that a strike out of the revision could ever be considered.

9. Mr. McMillan gave evidence on behalf of Telecom Eireann as it was then known. This was supplemented by reference to a letter addressed to this Tribunal dated 16th November 1998 and by a notice for and replies to particulars both arising out of Mr. Maher "addendum" to his original précis. Having referred us to 5 of the properties arising out of the 1995 revision which are currently under appeal, he then produced a list of about 45 properties which he intended also to rely upon so as to support his suggested reducing factor of, on average say 0.33%. The methodology so adopted by the rating consultant was to take a valuation assessed prior to 1988/1989 referred to as the old valuation (OV) and to divide that by an annual letting value which he derived from the latest R.V. placed on the property working on the assumption that such valuation was calculated by using 0.5%. In the first category of properties referred to, the resulting average was, as we have said, about 0.33%. Of the second category only two of the hereditaments included, namely 19b and 32c Parnell Street had a resulting fraction in excess of 0.5%. All of the others were that or lower. Inevitably therefore the average was significantly less than 0.5%.

10. In his own view Mr. McMillan described the exercise as carried out by him as being "*less than perfect*" and opined about the inadequate supply of information which if it were available would, he said, have made the carrying out of a comprehensive study/analysis possible. No criticism of this exercise is in any way intended by us and our judgment of it is not to diminish the skill and application brought to bear on this difficult task. However, there are some significant deficiencies in this exercise. For example, of the 45 properties so mentioned four had been valued in 1986, seven between 1980 and 1985, eight between 1970 and 1979, eight between 1960 and 1969 and others as far back as the 1930's. No information was available as to rents, tenure or as to what structural or user alterations/changes had been carried out or made to any of these properties since

valuation date. In addition, within this analysis, no account was taken of other changing circumstances for example employment rates/trends, economic advances, structural and infrastructural improvements and changes, the construction and opening of new retail and wholesale outlets, industrial developments etc. This being so we cannot see how this approach even broadly considered and even with permissible adjustments could safely be relied upon as establishing a satisfactory platform from which to operate Section 5. Furthermore we do not believe that in the context of the limited information available to the rating consultant and the analysis made thereon, that sufficient or indeed any regard was had to the various requirements specified in sub-section 2 of section 5, which in our opinion is mandatory for consideration and cannot be isolated, ignored or separated from sub-section 5(1) of this section. In these circumstances we are unable to follow this method or this assessment.

11. Prior to 1988/1989 the Valuation Office, it would appear, had a policy of valuing property on what was commonly known as the "*square metre basis*". This involved the application of a rate p. sq. m. to each square of measured rateable floor area in the property in question. That system underwent, as it had to, a dramatic alteration with the passing of the 1986 Act. In particular with the necessity to implement the provisions of Section 5. In order to so do it was necessary for the Valuation Office to devise some method, which would avoid a significant anomaly, which would result if net annual value was equated solely with rateable valuation. So a reducing factor which could be applied to the N.A.V. in order to calculate the R.V. had to be determined. Studies were therefore undertaken. In Clonmel the person responsible was Mr. Paschal Conboy. In July of that year he carried out the following assessment which meant, that when the resulting first appeals were dealt with in 1989 the new N.A.V. system was in use. In the first instance he looked for details of suitable properties which, broadly speaking, were categorised as being those, in 1988, which were recently revised on a square metre basis, which had recently established rents passing and where there had been no material change in structure, use or accommodation from the date of the R.V. as otherwise if those changes existed these would lead to a distortion in the relationship between R.V. and annual value. In all he identified 38 such properties. These were rented commercial

hereditaments. Eleven in 1988, ten, which met the criteria in 1987 and seventeen which likewise, did in 1986. The resulting percentages respectively for 1988, 1987 and 1986 were 0.55, 0.5879 and 0.431 which when averaged over the three years gave 0.5246. The average of all of the 38 properties gave 0.5083. He, Mr. Conboy, then proposed that the fraction of 0.5% would be adopted when dealing with the 1988 first appeals in 1989. It was so adopted and in the almost 300 revisions which had issued in the first five years of the 1990's it was so followed as well as in the 83 appeals arising therefrom. In the Commissioner's view this study/analysis was sufficient and was adequate to enable the operation of section 5 in the context of this general revision, which took place in Clonmel in 1995. In all 985 properties were revised which included 915 commercial properties. Consequently, the respondent urges upon us by way of a submission that the evidence so tendered is sufficient and adequate to meet the requirements of Section 5(1) and (2) and that the % of 0.5 should be applied.

12. The appellant criticised this exercise in a number of ways. In the first instance it is pointed out, as was the evidence, that Mr. Conboy undertook this exercise on his own initiative without any request or direction from the Commissioner to so do and accordingly such resulting material could not be used for the purposes of Section 5. This point is not in our opinion valid. The core of Section 5 is to establish a proportion between rateable valuation and net annual values. That is having regard to both sub-sections. If that is achieved then in our view it matters not how or in what way the source material was identified or ascertained or indeed, subject to overall statutory compliance, how the intervening analysis had been conducted. We are therefore of the opinion that this criticism in itself does not in any way preclude the Commissioner from acting upon it if otherwise it is valid to so do.

13. A major criticism however of what Mr. Conboy did is structured in the following way. In the first instance it is claimed that Mr. Conboy's study did not calculate net annual value *interalia* in that he did not examine the individual leases of the properties in question and therefore was not in a position to say whether the outgoings as specified in Section 11 were or were not taken into account in the rent figure as given. Secondly, it is pointed

out that ten of the 39 lettings were for a term of two years and nine months with one more being of two years and eleven months. The result being that the "terms" of these lettings were quite different from the term envisaged in Section 11 which also as a matter of probability had as a consequence a tenant who was not a true "*hypothetical tenant*", as the section contemplated. Furthermore with regard to the balance of the 38 properties it is suggested that many are for a term of years well in excess of that contemplated, others were created in circumstances where premiums were paid while some others still had no information available on them. In all the submission concludes that this was an unreliable exercise and cannot form the basis of operating Section 5. Finally in this context it is also submitted that if otherwise the sample was valid it was numerically invalid.

14. In considering this matter it is important once more to emphasise the statutory aim embodied within Section 5. It is to establish a proportion between N.A.V. and R.V./this so that inflation can be accommodated with the hoped for consequence of creating, even within a single rating area, if not the entire country, some uniformity and consistency. To achieve this the section does not mandate any particular or precise mechanism. Rather it specifies the aim as a policy objective and then leaves its implementation to the parties and bodies involved in operating this valuation system. Faced with having to incorporate Section 5 in his decision, the Commissioner of Valuation had carried out on his behalf a number of surveys and analyses. Some in Dublin and some elsewhere. As a result in the city and county borough areas a reducing factor of 0.63% was used whereas in the vast majority of rural rating areas a percentage of 0.5 was adopted and, save for a very limited number of variations, these percentages have continued to be applied to this day.

15. In both sub-sections 1 and 2 of Section 5, the requirement of complying with this statutory objective is modified by the phrase "in so far as is reasonably practicable". This clearly means that the legislature immediately acknowledged that difficulties may be encountered in establishing a means to justify, in a pure sense, the aim as specified. The result is that the identity of information, the ascertainment of facts, the analysis made and the resulting fraction applied could be accepted as a means of operating Section 5. if

those steps had been taken or taken out in a reasonably practicable way. It would of course have been far better if the draftsman had particularised a formula for use within Section 5. Indeed any such formula would have to be flexible as with the passage of time it inevitably became increasingly more difficult to identify and thus take into account rateable hereditaments which had, at that time, been recently revised. Even more difficulty could be encountered in trying to get copies of the leases/letting agreements in relation to each property. In the absence of being entitled, as of right, to get this information it can be very difficult to be certain that the passing rents equate with net annual values as envisaged in Section 11. In addition as Mr. Justice Barron pointed out in the IMI Case, Section 5 has a capacity of distinguishing between hereditaments of different uses and functions. This obviously within rating districts even ones of a limited administrative area. If this is so it can even be more difficult to obtain precise details about tenure, passing rents, deductions etc. So, whilst the value and underlying intention behind Section 5. can only be commended the practical difficulties in its implementation are considerable.

16. Be that as it may, the Commissioner must and on appeal, we the Valuation Tribunal also must endeavour to implement its provisions. It is only when there is no evidence upon or from which we could operate Section 5. that we would consider declining to rule on the appeal, which course, even in such circumstances, could be open to serious legal challenge. And so, we look at Mr. Conboy's evidence as we did with Mr. McMillan's evidence in this context.

17. There is no doubt but that some of the criticism levelled against Mr. Conboy's approach is valid and that a more scientific approach could and perhaps should have been carried out a decade or so ago. Nevertheless as imperfect as it is we are satisfied that it can form the basis for the use of Section 5. and that the percentage factor of 0.5%, which has been suggested, can be adopted. There is of course the problem about tenure but there is evidence of the duration of almost each letting and whilst we must infer and extrapolate therefrom we feel we can do so. The difficulty in this regard is evident by the fact that in the vast majority of properties mentioned by Mr. McMillan no details of tenure were

given. In addition there is a question mark over whether the "rent" used is exactly the same as an estimate of the N.A.V. as envisaged in Section 11. In some cases we are satisfied, from Mr. Conboy's evidence, that as a matter of probability it is the same or as close to it, as makes no difference. Limited or unsatisfactory as some parts of this evidence undoubtedly are, we feel that by a mixture of direct fact and legitimate inference we can use the evidence as support for the 0.5% reducing factor.

18. And so, bearing in mind the onus of proof, given our evaluation of the evidence tendered and acknowledging the use of this reducing factor of 0.5% over a number of years, we are satisfied, though with reservations, that its continuing application has not been dislodged by the contrary propositions advanced and thus for the purposes of this case we intend to so apply. The result is that within this rating area at least some uniformity and some consistency has undoubtedly emerged following the 1995 revision.

19. In conclusion we hope that it is not too adventurous for us to welcome the publication of the new valuation bill and to express our wish that as a matter of urgency this bill should become law so that the existing unsatisfactory state of valuation practice can be consigned to history and that a national and uniform system can operate in this the 21st Century.