Appeal No. VA98/2/016

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 1988

VALUATION ACT, 1988

Louisiana Pacific Coillte Ireland Ltd. **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

RE: Factory grounds at Lot No. 1E Gorteens, ED: Rathpatrick, RD: Waterford Co. Waterford
Rateable Occupation

B E F O R E
Liam McKechnie - Senior Counsel **Chairman**

Barry Smyth - FRICS.FSCS **Member**

Michael Coghlan - Solicitor **Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 30TH DAY OF APRIL, 1999

1. In November 1995, following the initiation of the appropriate procedures, the revised list issued, interalia, in respect of the premises identified as Lot No. 1E, Gorteens, situated at Rathpatrick, Co. Kilkenny. This said list showed Louisiana Pacific Coillte Ireland Ltd. as the occupier of such hereditament and placed thereon a rateable valuation of £6,600. In the circumstances hereinafter appearing, an appeal therefrom was taken to the Commissioner of Valuation who, in his decision dated the 30th March 1998 made no change in any material respect to the previously issued revised list.

By Notice in writing dated the 28th day of April 1998 the said appellant company further appealed to this Tribunal with the grounds thereof being set forth in the terms following; -

"(i) The hereditament was unfinished and incomplete on 10th November 1995 and accordingly (a) the hereditament was incapable of beneficial occupation at the material date for valuation, (b) the hereditament should not have been valued, (c) the valuation was premature.

(ii) The valuation assessment is bad in law having regard to the provisions of the Valuation Act and

(iii) The valuation is excessive and inequitable when rental values and other factors are taken into consideration and having regard to the provisions of the Valuation Acts".

2. As appears from the Notice last mentioned, issue was taken not only in relation to Quantum but also in relation to Rateability; that is in the sense that an allegation was being made that, as at November 1995 the said hereditament was unfinished and incomplete and accordingly, for the reasons as specified, the same should not have been rated. The Commissioner, in correspondence with this Tribunal, has raised an objection to the grounds of appeal in so far as these relate to the said issue of rateability. He alleges that the appellant company should not be permitted to pursue this ground. He does so, essentially, on the basis that as the same was not part of the grounds advanced at first appeal it ought not now be argued before this Tribunal. It is on this issue only and not on the merits of the appeal proper, that both the preliminary hearing and this judgment are concerned.

3. Evidence in this case was in part oral and in part written. Mr. Eamon Rowan, who was then a Staff Officer in the Rates Section of Kilkenny County Council, The Rating Authority, gave evidence as did Mr. Bagnall and Mr. Tadhg Donnelly both of the firm representing the appellant company. Certain relevant documents, as well as correspondence were handed in without objection. Both Mr. Hickey B.L. and Mr. O'Caoimh S.C., who appeared on behalf of the respective parties, presented written

submissions and supplemented these by verbal argument. From the evidence so tendered the following facts, which are not in any sense in issue between the parties, emerge, as being relevant and material to this limited appeal;-

(a) By Notice in writing dated the 4th day of December 1995 Mr. Donnelly appealed the decision as contained in the revised list, in the following terms –

"*Dear Sirs,*

We are appealing the Valuation on the Grounds it is excessive and inequitable when rental values and other factors are taken into consideration and furthermore on the grounds that the Valuation is premature and other grounds which we will specify at the time of the hearing. Please find enclosed, a cheque made payable to the secretary in the Valuation Office in this regard".

(b) Reference in this Notice of Appeal to " ……. *on the grounds that the valuation is premature*…….", was, and we are quite satisfied was so intended, to cover the issue of rateability; in otherwords one of the grounds being advanced was that as at November 1995 the premises was incomplete, unfinished and therefore was incapable of beneficial occupation in consequence of which, if correct and accepted by the Commissioner of Valuation, the same should not have been so rated in the November 1995 list.

(c) On receipt of this said notice Mr. Rowan telephoned the offices of Brian Bagnall and Associates and spoke with Mr. Donnelly. He raised two points, the first was to the effect that the letter was addressed to the Rates Department and not to the County Secretary. The second related to "the prematurity argument" which for the purposes of this appeal shall be deemed synomonous with the "rateability argument". Mr. Rowan was of the view, and so told Mr. Donnelly, that, in relation to rates, an arrangement/agreement had been reached between the Council and the Ratepayer, whereunder, in return for certain concessions, the appellant company would not be proceeding with the issue of rateability in relation to the hereditament the subject matter of this

judgment. He asked that this matter be checked out and Mr. Donnelly so agreed.

(d) By a second Notice dated 6th December 1995, Mr. Donnelly further wrote to the County Council but on this occasion the grounds of appeal were materially different from those specified in the earlier Notice dated the 4th. The revised grounds were as follows;-

"*Dear Sirs,*

We wish to advise you that following our client's instructions we are appealing the revised valuation on the above property on the grounds that it is excessive and inequitable compared to similar type properties. Our cheque dated 4th December for £200 payable to the secretary of the Valuation Office includes the £75 appeal fee for this case. Please acknowledge.

Yours faithfully".

(e) In addition to the Addressee now being the County Secretary this second Notice before setting forth the grounds of appeal specifically referred to "our client's instructions". It will be immediately observed that no reference whatsoever is made to the issue of prematurity and hence no reference to the issue of rateability. On receiving this document Mr. Rowan wrote upon the first Notice the word "withdrawn".

(f) In evidence Mr. Bagnall informed the Tribunal that, within the company, his source of instruction, came from a Mr. Cooney, the Chairman. On foot of those instructions the original Notice dated the 4th December was served. Subsequent to the telephone conversation with Mr. Rowan further instructions were taken from the company, this time from the financial controller, a Mr. Kevin Leep. Apparently the reason therefore was the unavailability, in the timescale involved, of Mr. Cooney. In any event we were so informed by Messrs Bagnall and Associates that on the express instructions of Mr. Leep, a new Notice of Appeal was to be served and therein the issue of prematurity was

to be deleted from the original Grounds and was not to be pursued. This by reason of the arrangement/agreement above referred to which indeed had been made and which was in place. It was pursuant to such instructions only that the second Notice issued in the terms in which it did.

(g) The details of the said arrangement would appear to be contained in an exchange of correspondence between the general manager of the appellant company, Mr. Glenn on the one hand and the Finance Officer of Kilkenny County Council, Mr. Magner on the other. See two letters both dated 7th December 1995. Though not informed as to whether such arrangements were infact implemented this point is of no relevance to us or to the issue presently before us.

4. Matters thus proceeded with both written and verbal contact being made between the agent on behalf of the ratepayer and the appeal valuer Mr.Maher. From the correspondence commencing with Mr. Maher's letter dated 26th August to Brian Bagnall & Company and ending with a letter dated the 17th April 1998 to Mr. Maher, it is clear that Messrs Bagnall & Company wished to have the prematurity argument revived and considered as part of the First Appeal process. However and not withstanding their clear initiative in so doing, Mr. Maher through Counsel, has informed us that in his recommendation to the Commissioner, he specifically refused to consider this question of rateability as the same had not been included in the Notice dated the 6th December which, incidentally was the only notice transmitted to the Valuation Office. In such circumstances we accept that the Commissioner did not in fact take this ground of appeal into consideration when issuing the results of the first appeal process.

5. In light of the foregoing, the Commissioner of Valuation advances three main arguments in support of his objection to permitting the issue of prematurity/rateability to be raised before us. Firstly it is claimed that the only valid Notice of Appeal is the one dated the 6th December 1995 and that, when contrasted with the earlier notice and in particular when looked at in the context of the evidence above recited, it is clear therefrom that the issue of rateability was not included therein but was in fact, specifically excluded therefrom: this following and pursuant to the express

instructions of the client. Accordingly this ground should not now be entertained there being no reasons in justice why it should be so allowed. Secondly it was alleged that, in the context of the first appeal process, no further or additional grounds of appeal can be advanced subsequent to the expiry of the appeal period, see Sections 19 and 20 of the 1852 Valuation (Ireland) Act. Similar consequences apply with an appeal to this Tribunal, see Section 3 (5) of the Valuation Act 1988. Thirdly it is claimed, that as a matter of law, whether by way of estoppel or otherwise, the correspondence above recited could not have the effect of enlarging the grounds of appeal as originally presented.

6. On behalf of the appellant company it was claimed firstly that the Notice of Appeal dated the 4th December 1995 was in fact never withdrawn and that it continued to exist side by side with the later notice dated the 6th December. Secondly it was submitted that the fact of the "Rates Department", being identified as the addressee in the earlier notice did not in any way invalidate the same either under Section 19 of the 1852 Act or at all. If necessary the "*de minimis*", principle should apply. Thirdly it was argued, that in any event, the word "inequitable", contained in the Notice dated 6th December, was in itself sufficient to keep alive the issue of prematurity. As an alternative to these submissions, Mr. Hickey suggested that since the issue of prematurity/rateability was raised in correspondence with the appeal valuer, then in accordance with the principles of justice and following the appeal decisions in *VA95/5/015 - John Pettitt and Son Ltd.* and other similar cases, this Tribunal should now permit the disputed ground of appeal to be raised and to be argued before us.

7. The undisputed evidence in this case was that post the telephone conversation with Mr. Rowan, express instructions were sought and obtained from the Financial Controller of the appellant company. This person because of the absence of Mr. Cooney. Having been informed that an arrangement had been made with Kilkenny County Council and having been told to serve a new notice of appeal with the word "prematurity" being deleted therefrom, it is our opinion that, if Messrs Bagnall & Associates wished to continue to represent the ratepayer in this case they had no choice but to follow these instructions and serve such a notice in the amended form. This they did. To do otherwise would be contrary to such instructions could indeed be in breach of warranty of authority. In both accepting and acting upon these

instructions they were representing the appellant company and not any individual section or part thereof. It would be highly undesirable, totally invidious, and contrary to accepted legal principles if third parties, unconnected with the corporate entity, could not rely and act upon instructions given by such a senior person as the financial controller, in particular on matters directly affecting a person's remit. Accordingly in our view there cannot be any question that these instructions and the actions taken pursuant thereto, were in any way less valid than if the source thereof was the Chairman himself. We are therefore quite satisfied that the company's instructions were to the effect that the prematurity argument was not to form a ground of appeal and was not to be pursued as part of the first appeal process.

8. In view of this finding and following the receipt of the Notice dated the 6th December, in our view, the rating authority was perfectly correct in concluding and thereafter in treating the earlier notice dated 4th December as having been withdrawn. However even if the County Council had not reacted in this way it seems to us that no other conclusion could be arrived at (a) since there cannot be any question of there having been two appeals in this case and, (b) since the second notice was more restricted and more limited than the first, it would be entirely illogical and would indeed fly in the face of reason and common sense to suggest, in these circumstances, that both notices should stand side by side one with the other. The real issue therefore is whether, given the findings above made, the appellant company should now be permitted to raise this ground of appeal before the Tribunal. In some decisions of the Tribunal it may have been felt that a ground of appeal not previously argued could never, in any circumstances be raised before us. This view however we feel is not correct. Having referred to many decisions, having mentioned the practice of the courts and in particular the practice of the Supreme Court, this Tribunal, in the case of *VA95/5/015 - John Petitt & Son Limited –v- Commisisioner of Valuation* ….. at paragraph 10 thereof said the following;-

"*This Tribunal is of course a creature of statute. It is not a Court established by or under the Constitution or by or under the Courts (Establishment & Constitution) Act 1961. Whilst its existence depends on the 1988 Act, the validity of its actions and decisions must surely be constitutionally safe as falling within the Provisions of Article 37 thereof. In any event it would in our view be quite*

invidious for a Tribunal of this nature to have a rule of practice or procedure or to adopt a jurisprudence which is at variance with that practised in the Courts above mentioned and in particular in the Supreme Court. It seems to us therefore that we ought, and indeed must follow the principles enunciated in the cases above identified. Accordingly it is our firm view that it would be quite wrong to have a practice of exclusion which, given the importance of the case and the interests of justice, did not permit of exceptions or deviations therefrom. So, it is therefore our decision that whilst, as a general rule, where a ground of appeal has not been advanced before the Commissioner it will not be possible to raise it before us nevertheless, in exceptional circumstances where the interest of justice requires, this Tribunal will permit the raising of a ground, the reception into evidence and the reliance on a point of law none of which have previously been so raised or so adduced. We are satisfied that the previous judgments of this Tribunal, on this point, were all intended to be read and understood in this manner".

Applying these general principles to the facts of this case, it should be immediately noted that the instant circumstances are quite different from those contained within the decisions as so mentioned. In virtually all of these other cases, the ground or grounds of appeal sought to be adduced and relied upon, were in some instances not previously raised other than for the purposes of the appeal to this Tribunal, in other instances were raised not formally but informally with the appeal valuer, and yet in other cases were taken into account at the first appeal process. In none of the cases however were the disputed grounds raised, abandoned and then sought to be raised again. That is in fact what is now being sought in this case. In our view there is no requirement of justice, equity or fairness, which we can identify and which would compel us to permit the raising of this ground of appeal. Indeed it is our considered opinion that the contrary is the position. For whatever reason and whether beneficial or otherwise, an arrangement was made between the ratepayer and the rating authority whereunder, in return for benefits, actual or perceived, the ratepayer agreed to abandon the issue of rateability. This decision was taken obviously for commercial and business reasons. When compared with continuing with this issue it must have been considered in the best interests of the company to adopt the contrary course

and to accept the comprise or agreement so reached. In our opinion it must abide by that agreement whatever the follow through may have been. It made this decision in an informed and purposeful way and did so with its perceived advantage. It must now abide by it. Accordingly we can not see how this case could be deemed an exception to the general rule above-mentioned. Furthermore we cannot identify any exceptional circumstances, in the interests of justice, which would require a favourable decision on the incorporation of the amendment now being effectively sought. In these circumstances the Tribunal so rules that this ground cannot be advanced or argued before it when it embarks upon the hearing proper.

9. In arriving at this decision we have not found it necessary to make any determination on Mr. O'Caoimh's submission that by reason of the statutory provisions above mentioned there can not be, subsequent to the appeal period, any enlargement of the grounds of appeal either in the first appeal process or in the appeal to this Tribunal.