

Appeal No. VA98/3/070

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

Courts Limited

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Warehouse at Lot No. 2Aa Townland: Fox & Geese Common, D.E.D. Clondalkin
Monastery, Co. Dublin

Quantum - Role of the expert witness

B E F O R E

Liam McKechnie - Senior Counsel

Chairman

Ann Hargaden - FRICS.FSCS

Member

Finian Brannigan - Solicitor

Member

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 8TH DAY OF JUNE, 1999

By Notice of Appeal dated the 5th August 1998 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of £1,850 on the above described hereditament.

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

"I The assessment is bad in law in that it does not comply with the provisions of the Valuation Acts 1852 to 1988 and in particular the provisions of Section 5 of the Valuation Act 1986.

- II This assessment is bad is grossly excessive and inequitable relative to assessments on other retail warehouse premises in the general Naas Road area and in particular with reference to the assessments in respect of the Texas Homecare and Atlantic Homecare facilities on the Naas Road”.

The oral hearing took place in the offices of the Valuation Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 19th April 1999. Mr. William A Tuite FRICS, Director of Jones Lang LaSalle and Mr. Owen Hickey, Barrister at Law instructed by Matheson Ormsby Prentice, Solicitors appeared on behalf of the Appellant and Mr. Noel Norris, District Valuer with the Valuation Office and Mr. Eamonn Marray, Barrister at Law, instructed by the Chief State Solicitor, appeared on behalf of the Respondent.

During the course of this appeal it became evident that the personal view of the appeal valuer, as to what the N.A.V. and thus the R.V. should be on the subject property, was substantially and materially different from the view of the Commissioner as expressed in the results of the first appeal. As this valuer was the only expert witness intended to be called on behalf of the Respondent, an issue accordingly arose as to how and in what manner appeals, before this Tribunal, should be conducted on behalf of the Commissioner. Given the potential significance of this matter and realising its possible general application, the Tribunal decided to treat this issue in a separate and distinct way from the other issues arising in this appeal. Accordingly in Part. I of this judgment the matters so raised are identified and dealt with whilst in Part. II the Tribunal’s analysis and determination of the R.V. is set forth and considered.

PART I

1. Having taken the oath Mr. Norris, the appeal valuer, adopted his written précis as representing his evidence in chief. Perhaps in hindsight it would have been more accurate at that time to enter a caveat or indicate a reservation because, the evidence as contained in this précis did not in fact accurately represent the views of Mr. Norris. Be that as it may, it became quite clear, as the case proceeded that Mr. Norris felt uneasy with certain aspects of his evidence as for e.g. the suggested analysis and applicability of some of the comparisons, the way in which the mezzanine floor was dealt with and the method by which the passing rent was related back to November

1988. Indeed, as a result of certain concessions, necessarily and properly made by Mr. Norris, it became evident that his views very much coincided with those of Mr. Tuite, the valuer on behalf of the appellant.

2. However, up to this point in the case, one could have rationalised such concessions as simply being the product of Counsel doing an excellent job on behalf of his client. What happened thereafter was however more problematic. Having indicated a view that the figure of £1,850.00 was a little on the high side it became quite obvious that in the personal opinion of Mr. Norris this figure, or indeed any figure close to it, could not be justified, and that accordingly, he could not in any credible way stand over or under-pin such a figure. For reasons, quite legitimate, and perceived to be in the best interest of his client, Mr. Hickey did not press the valuer to state his own independent view. Accordingly, as his evidence then stood the Tribunal had before it, the opinion of Mr. Tuite in the sum of £1,375.00 but had no expert opinion of the Respondent's figure. Of its own motion the Tribunal ascertained that the view of the appeal valuer was approximately £1,500.
3. Thereafter the residue of the appeal proceeded in a non-eventful way and, at the conclusion thereof, as is the practise, Judgment was then reserved.
4. In general, one of the principal rules of evidence is that witnesses, are supposed to testify only in language of perception, that is in relation to their perception of facts. They are not entitled to draw opinions or conclusions therefrom. This category of person is frequently referred to as a "Witness of Fact". An exception to this rule is made in the case of experts. The opinion of such persons is admissible in order to assist the Court or Tribunal to understand evidence or determine a fact in issue if that person is qualified as an expert in the relevant field either by way of study or experience. See p. 141/142 of Fennell, on the Law of Evidence in Ireland and also p.1 of "The Role of the Expert Witness", by Daly. This type of witness is known as the "Expert Witness". Quite unlike a witness in the former category such a person can both offer an opinion and draw conclusions. If however, such an opinion or conclusion is based on fact, then that fact must be independently proved by some other party. See par 32.08 of Phipson on Evidence 14th Ed.

5. Mr. Justice Ackner, in Ollnet –v- Bristol Aerojet Limited, 1979, 1 WLR 11/97 put the matter rather succinctly. He said “an expert, unlike other witnesses, is allowed because of a special qualification and/or experience to give opinion evidence. It is for that opinion evidence that he is called not for a factual description of the underlying circumstances”. The exception to the general rule, by admitting such evidence, is justified on the basis that an expert is there to assist the Court or Tribunal in arriving at the truth by providing a skilled expert assessment, which is objective and fair. His principal and overriding duty, is not to the party by whom he is retained, but to the Courts. See Hodgkinsons, Expert Evidence. Such a person is paid for his time and expertise but not for his testimony.

6. In today’s world of practise, one might or indeed might not think, that the following quote from Taylor on the Law of Evidence 12th Ed. (1931) is a little harsh but nonetheless it is apt to remind us of the special status of an expert witness as well as describing the pitfalls and dangers of failing to keep, in an elevated and prioritised position, the overriding duty of such a person Mr. Taylor said:- “it is often quite surprising to see what facility, and to what an extent, their views (of experts) can be made to correspond with the wishes or the interest of the parties who called them. They do not, indeed, wilfully misrepresent what they think, but their judgments become so warped by their regarding the subject in one point of view, that even when conscientiously disposed they are incapable of forming independent opinion”. See also the excellent paper produced by Mr. Fred Devlin, F.S.C.S. F.R.I.C.S., a former Vice-Chairman of this Tribunal, entitled The Role of the Expert Witness, given to the Society of Chartered Surveyors on the 6th of November 1996.

7. An Advocate on the other hand has a role totally different to that of a witness, whether of fact or opinion. The purpose and function of such a person is to marshal and thereafter to present, as best as possible, the facts of his client’s case, secondly, to challenge the evidence produced by his adversary, thirdly to make and respond to submission and fourthly to advise both specifically and generally. His role does not extend to but rather in fact specifically excludes the giving of evidence. He is the presenter of fact and law. In a paper published, in Issue No. 4 of the Journal of the Bar of Ireland, his Honour, Mr. Justice Barr, a Senior Member of the High Court, at page 185 said the following:-

“it is important to bear in mind that the function of the advocate differs fundamentally from that of the expert witness. The objective of the former is to present his/her client’s case. In contrast, as already stated, the function of the expert witness is to advise the Court as to his/her objective professional assessment of a given situation based upon established facts and specialist information and learning about which the expert should be aware”.

Accordingly the division between such persons and their respective roles is now so well established that its integrity is beyond challenge.

8. Notwithstanding the importance of what is above stated, which in its own right would indeed merit a revisit, the real issue of focus in this case, is not so much the duty which an experts owes to the decision making body, but rather it is the dual purpose and function which an appeal valuer frequently performs in conducting an appeal before us. He is at one and the same time an advocate in that he presents certain facts, challenges the evidence adduced by and on behalf of the appellant and in the appropriate case, makes submissions. He is however more than that. He also takes the oath and gives evidence. Not evidence as to fact in the sense as described above, but evidence of opinion. Such opinion, inference and conclusion, being to the effect that a certain property should have a N.A.V. of X£ and thus an R.V. of Y£. Of course he supports this opinion by proving certain facts and/or relying upon others, which are not disputed. He refers to comparable properties and draws support therefrom. He concludes by suggesting that the available evidence is a full justification for his considered view. But throughout all of this he is performing the twin function of being an advocate and an expert. Indeed, it should immediately be said that, generally, this has worked well and to such an acceptable standard that it commands the widespread respect of those involved in issues of this nature. It is in an effect to preserve this *modus operandi* that we have seen fit to isolate the issue at hand and give independent consideration to it.

9. As it happened, the Commissioner in the instant appeal was represented by Solicitor and Counsel. Therefore the advocacy role was assumed by such persons and in particular by Mr. Marray B.L. And so it was possible for the appeal valuer to confine himself solely to the giving of expert evidence. As above stated the results of first appeal suggested an R.V. of £1,850.00. That clearly did not represent the view of Mr.

Norris. Indeed, if no intervention had taken place, it may well have been the situation that the only expert figure was that of Mr. Tuite. If that situation should have occurred it was likely that the appellant would have made a submission to the effect, that in such circumstances, the only evidence before this Tribunal was that of Mr. Tuite and accordingly that such evidence was either conclusive (and had to be followed) or at least that it ought to have been followed. Whilst the views of an expert witness, even if uncontradicted, are not intrinsically binding on a Tribunal of fact, as otherwise its adjudication function would be usurped, nonetheless such a submission would have been of real force and in the circumstances may well have succeeded. That however was not the end situation and Mr. Norris, as above recorded, suggested a figure of £1,500.00.

10. Accordingly, as the evidence concluded, the Tribunal had before it in effect three figures, the first being £1,370.00 as suggested by Mr. Tuite, the second being £1,500.00 as representing the personal opinion of Mr. Norris and the third being £1,850.00 the figure determined at first appeal stage. On this evidence it should be stated forthwith that this Tribunal could not under any circumstances make a finding that the correct R.V. in this case could exceed £1,500.00. The “*précis*”, as such which had formally been exchanged and submitted, is not and does not have the status of evidence. That changes when the *précis* is adopted. But once derogated from, its cogency and weight is abandoned. When this happens the relevant parts thereof are replaced by the *viva voce* evidence of the expert so called. In this instance that was Mr. Norris. Therefore it is without question that the only figures which this Tribunal could take into account were those given by Mr. Tuite and Mr. Norris. This to the exclusion of that as pronounced by the Commissioner at first appeal stage.
11. The difficulty therefore is this. If the appeal valuer, acting either in his dual capacity or solely as an expert witness, is not in a position personally, to stand over, support and under-pin the results declared at first appeal stage, then there is no credible evidence before this Tribunal upon which, if it was otherwise so minded, it could dismiss the appeal and affirm the Commissioner’s appeal figure. It simply could not do so and this because of the absence of any sustainable evidential base. It is no answer to suggest that the valuer is representing the Commissioner. He cannot, by some sort of representation or proxy, purport to put forward a figure, being that of the

Commissioner, which he himself, as an expert, does not support. It would be quite wrong to do so. It would be a breach of the clear distinction between an advocate and an expert witness. It would, in addition we feel undermine the confidence, which undoubtedly exists in the present system. It could result in the process becoming shallow and diluted. It would mean a radical departure from the practise, ostensibly carried out up to now and would deprive an appellant of any real or effective method of challenging the person whose views are truly behind the appeal figure. It is therefore an unacceptable practice.

- 12.** In these circumstances, as we have said, it is unsatisfactory for an appeal valuer to act as an expert witness when in fact and in truth, his professional opinion, as such an expert, does not accord with the figure which he purports to suggest. If and when such a situation should again emerge then some alternative method will have to be identified in order to meet these concerns, which method must accord with the principles outlined above and also with the concept of justice and fair procedures. How in fact this should be achieved is of course a matter for the Commissioner as any suggested solution by us would be a pre-emptive interference into the domain of his jurisdiction. The matter thus rests with the Commissioner.

PART II - QUANTUM

13. Valuation History

The property was included in the revised Valuation Lists issued to the South Dublin County Council on the 8th November 1996 described as warehouse with an RV of £1,900.00. An appeal was lodged on 4th December 1996 against this assessment and the valuation was reduced from RV £1,900 to £1,850, published on the 6th July 1998.

An appeal was lodged to the Valuation Tribunal dated 5th August 1998 in relation to the quantum of the reduction.

14. Property

(a) Situation

The property is situated on part of a triangular site between Nangor Road and Killeen Road which fronts onto the Naas Road and is adjacent to the M50/Naas Road interchange west of Dublin.. Access to the premises is from the city bound lane of the

dual carriageway via Killeen Road which is one way for a portion of its length or alternatively via Nangor Road and Killeen Road. The property adjoins the premises of Harry Ramsdens and the residue of the entire triangularly shaped site, which is undeveloped.

(b) Description

The property comprises a purpose built retail warehouse developed on behalf of Courts Limited by Smith Construction. The building is of traditional steel frame construction with a metal deck roof and eaves height of circa 6 m. (20 ft.). Car parking facilities for approximately 250 cars are provided at the front and rear of the facility and also alongside the main entrance elevation fronting Nangor Road.

(c) Accommodation

The agreed floor areas of the accommodation provided are as follows: -

	<u>Sq. M.</u>	<u>Sq. Ft.</u>
Retail Warehouse Area	3,933.4	42,335
Warehouse Area Ground Floor	167.2	1,800
Mezzanine Storage - including toilets, plantrooms, partitioned canteen & office	1,799.8	19,371

15. Title

A sale and leaseback arrangement was entered into by Courts Limited with New Ireland Insurance Company Limited under which Courts Limited leased the premises for a 25 year term from the 23rd April 1996 subject to a rent of £353,080.00 per annum on standard FRI terms.

THE APPELLANT'S CASE

Mr. William Tuite adopted his précis and gave evidence and the following details were outlined: -

1. The property comprises a purpose built retail warehouse on the corner of Naas Road and Nangor Road with access via the latter and via Killeen Road. It forms part of a site which is an island, adjacent to an undeveloped site to the rear and adjoining lands

owned by Pino Harris which are used in the main for truck storage. The premises is also adjacent to Harry Ramsden's premises which obstructs the profile of the subject, when approaching the city on the Naas Road.

2. The lease is a standard full repairing and insuring lease which was entered into by Courts Limited as Vendor on a sale and leaseback basis to New Ireland Insurance Company Limited. The lease was structured so as to achieve the highest price for the vendor and in these incidences the rent is normally as high as the investor will accept.

3. In assessing NAV, the primary evidence relied upon were the first and second comparisons in the Appellant's précis outlined in the appendix, that of; Texas Homecare and Atlantic Homecare in the Royal Liver Retail Park on the Naas Road. The Valuation office has analysed the Texas Homecare retail warehouse unit at a slightly lessor figure than the Appellant at £4.50 p.s.f. and applied different rates to the garden centre and the yard, as well as the mezzanine floor. In relation to this comparison, Mr. Tuite indicated that it was in the same locality and of a similar size, let to a UK retailer. The premises was let in 1990 which was the closest date of any of the comparisons to 1988. He then referred to the Atlantic Homecare Unit and indicated that this also dated from 1990 and was geographically close to the subject premises, but the rent was less as it is an older building than the Texas Homecare and Courts buildings.

4. In completing a check on his assessment, Mr. Tuite applied the Jones Lang LaSalle Industrial Index to the passing rent, set in April 1996 back to November 1988, and arrived at a figure of £230,000 per annum on the subject premises or an RV of £1,454 per annum. He then argued that the original rent was on the high side because it was set in the context of a sale and leaseback basis. He indicated that his comparisons 3, 4 & 5 were secondary evidence as back-up to his primary evidence. (See appendix)

Mr. Marray then cross examined Mr. Tuite who indicated in his response the following: -

- (a). The access to the premises is not good, in that it is approached by a partly one-way traffic thoroughfare and via an inferior roadway, not constructed in accordance with modern standards. The Royal Liver Park access is much better in that it has an

approach from the old Naas Road, this is a two way traffic thoroughfare which is in much better condition than the roadway leading to the Courts unit.

- (b). He confirmed that perhaps this might be Courts “flagship” unit in Ireland, but only because they only had two units to date in Ireland. He did not think that there was much difference in the profile between the Texas Homecare unit and the Courts Limited unit as, it is a question of interpretation as to whether it would be preferable to have customer car parking between the Naas Road and the main building, or to the rear of the main building. In his view, it was easier for customers to unload/load goods into their cars if the car parking is located to the front of a building and even though Texas is set back from the Naas road, it still has a good profile.
- (c). When asked about exclusive car parking versus non exclusive car parking, Mr. Tuite indicated that he did not think that this would affect value and in fact there was a view that a concentration of occupiers in one retail park gives critical mass and attracts a higher number of customers.
- (d). The residue of the triangular site being undeveloped was detrimental in the Appellant’s view as it led to a bad impression of the access to Courts.
- (e). The passing rent was not quite armslength as Courts dictated the rental terms to be set when disposing of the property.
- (f). He then referred to Atlantic Homecare and indicated that it was at right angles to the Naas Road and had a good profile.
- (g). In relation to the mezzanine floor the cost of the same had been calculated and indexed back to 1988 by using the construction cost index to arrive at a figure of £0.50 p.s.f. on this space. He had also taken into account the Texas Homecare mezzanine floor which analysed at £0.60 p.s.f.
Mr. Tuite then indicated that in his opinion the fair rateable valuation attributable to the premises having regard to its net annual value at November 1988 is RV £1,370 which analyses at;

Retail Warehouse	42,335 sq. ft. }		
Incl. Warehouse	}	@ £4.70	£207,434.50
Warehouse	1,800 sq.ft. }		
Mezzanine	19,371 sq. ft. }	@ £0.50	£ 9,685.50
Total			£217,120.00
RV		@ .63%	£ 1,370.00

THE RESPONDENT'S CASE

Mr. Noel Norris commented on the principal features of the property as follows: -

1. He indicated that it had a very high profile with frontage to the Naas Road and because of this it warranted a higher net annual value than the premises within the Royal Liver Insurance Park.
2. There is little difference in the access to Texas Homecare or Courts Limited and the premises used as comparisons did not have the same profile as Courts.
3. He thought that the exclusive use of the car park was very important to a destination retail unit and had a very significant value to Courts and that in his view this appeared to be their flagship in Ireland.
4. In assessing the rental value of the mezzanine space, the appropriate rates were £1.50 p.s.f. and £3.50 p.s.f. and that because of the nature of the premises the storage was essential to the whole operation and that the occupier could not operate without this storage.
5. In relation to Mr. Tuite's comparisons, he agreed that the Texas Homecare unit was very relevant and that he would not disagree with Mr. Tuite's analysis. He indicated that the Atlantic Homecare unit is relevant but not as good a building. He then indicated that Woodies in Lucan was a reasonable comparison, but did not have the same profile or proximity to the city.
6. Mr Norris indicated, in response to a question from the Chairman of the Tribunal, that

in his personal view, the RV should be as follows: -

	<u>Sq.ft.</u>	
Retail Warehouse	42,335	@ £4.75
Warehouse	1,800	@ £3.00
1 st Floor Canteen etc.	1,336	@ £3.50
1 st Floor Mezzanine	18,035	@ £1.50
Total		£238,220
@ 0.63%		£1,500 R.V.

Determination

The Tribunal in considering both parties evidence accepts that this is a high profile unit situated along the Naas Road which is somewhat obstructed from view by Harry Ramsden's premises on the route into the city. The access is poor when compared to the access to the main comparisons submitted at Royal Liver Park. In addition, the existence of the undeveloped site in the vicinity does not help the NAV. Mr. Norris accepted the points raised by the Appellant's valuer in relation to the Texas Homecare and Atlantic Homecare units in the Royal Liver Park and indicated that these comparisons were indeed the primary evidence of relevance in this case. The most relevant comparisons of mezzanine space appears to be that included in the Texas Homecare unit which is valued at £0.60 p.s.f. and the Tribunal has taken this rate into account.

Our determination, taking into account all factors is as follows: -

	<u>Sq. Ft.</u>		
Retail Warehouse	42,335	@ £4.75	£201,091
Warehouse	1,800	@ £3.00	£5,400
Mezzanine	19,371	@ £0.60	£11,622
Total			£218,113
@ .63%			£1,374
RV			£1,375

The Tribunal therefore determines the R.V. to be £1,375.