

Appeal No: VA20/4/0059

**AN BINSE LUACHÁLA
VALUATION TRIBUNAL**

**NA hACHTANNA LUACHÁLA, 2001 - 2020
VALUATION ACTS, 2001 - 2020**

Perputua Fitness

APPELLANT

and

Commissioner of Valuation

RESPONDENT

In relation to the valuation of

Property No. 2198975, Gymnasium at 2WML Building, Windmill Lane, Dublin 2.

B E F O R E

Barry Smyth - FRICS, FSCSI, MCI Arb

Deputy Chairperson

Allen Morgan - FSCSI, FRICS

Member

Patricia O'Connor - Solicitor

Member

**JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 11th DAY OF JANUARY, 2023**

1. THE APPEAL

1.1 By Notice of Appeal received on the 7th day of December 2020 Mr. O'Donoghue appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV)' of the above relevant Property was fixed in the sum of €181,500.

1.2 The sole ground of appeal as set out in the Notice of Appeal is that the determination of the valuation of the Property is not a determination that accords with that required to be achieved by section 28(4) of the Act because: "*The valuation is incorrect. The valuation is excessive and inequitable.*"

1.3 Mr. O'Donoghue considers that the valuation of the Property ought to have been determined in the sum of €66,600.

2. VALUATION HISTORY

2.1 On the 29th day of September 2020 a copy of a valuation certificate proposed to be issued under section 24(1) of the Valuation Act 2001 (“the Act”) in relation to the Property was sent to Mr. O’Donoghue indicating a valuation of €181,500.

2.2 A Final Valuation Certificate issued on the 10th day of November 2020 stating a valuation of €181,500.

3. THE HEARING

3.1 The Appeal proceeded by way of an oral hearing held remotely on the 16th day of February 2022. At the hearing the Appellant was represented by Mr. Donal O’Donoghue B.Sc. (Hons) Estate Mgmt, DipVals, MSCSI, MRICS and the Respondent was represented by Mr. John Shaughnessy of the Valuation Office.

3.2 In accordance with the Rules of the Tribunal, the parties had exchanged their respective reports and précis of evidence prior to the commencement of the hearing and submitted them to the Tribunal. At the oral hearing, each witness, having taken the oath, adopted his précis as his evidence-in-chief in addition to giving oral evidence.

4. FACTS

4.1 From the evidence adduced by the parties, the Tribunal finds the following facts.

The Subject Property

Location

The subject property is located at Windmill Lane, a modern mixed commercial/residential area within Dublin’s Docklands, described as being in the core of Dublin’s Central Business District. Geographically, the immediate area within which Windmill Lane and the subject property is located is bounded by Sir John Rogerson’s Quay (SJQR) to the north, Hanover Street East to the south, Lime Street to the east and Creighton Street to the west. Windmill Lane is an “L” shaped access road within the immediate aforementioned area, running between Creighton Street and SJQR.

Description

The subject property is a unit within a Hibernia REIT development in the above-mentioned area, which makes up a quartet of buildings collectively known as the Windmill Business Quarter. In total the Hibernia REIT development is stated to cover 3.4 acres, with 400,00sqft of lettable office space, 7,500 sq.ft of café/bar/retail, a 12,000 sq.ft gym, (the subject property), and 14 apartments.

The subject property is a unit located at ground floor and basement level of the 2WML building, with dual frontage onto Windmill Lane and Hanover Street East. The main access point of this unit is currently onto Windmill Lane with a secondary access point onto Hanover Street East. The office building, 2WML, in which the subject property is located, has been awarded an LEED Gold certificate and holds a BER A3 rating, the building having been extended and upgraded by Hibernia REIT following their acquisition of the complex.

Accommodation (areas agreed with Respondent).

The accommodation in the subject property comprises a gymnasium/fitness centre. Most of the accommodation, the main gymnasium of 1,130.90sqms is at ground floor level, with a further 125.90sqms of storage/plant at basement level. The accommodation is generally laid out in open plan format with an entrance hall/lobby at the front entrance. The property is fitted out with changing rooms and shower facilities. In terms of equipment, the gymnasium has a range of fitness-related equipment associated with such businesses.

Tenure

The subject property is held by the Appellants, Cross Fit Ireland Limited, t/a Perpetua Fitness under a 10-year lease from 7th November 2018. Initially the rent was a stepped rent until 1st. April 2021 when the annual rent payable at that point was €182,595, since when the lease terms (in terms of the rent payable) were changed to an annual rent based upon turnover.

5. ISSUES

1. That the valuation is incorrect.
2. That the valuation is excessive and incorrect.

6. RELEVANT STATUTORY PROVISIONS:

The value of the Property falls to be determined for the purpose of section 28(4) of the Valuation Act, 2001 (as substituted by section 13 of the Valuation (Amendment) Act, 2015) in accordance with the provisions of section 49 (1) of the Act which provides:

“(1) If the value of a relevant property (in subsection (2) referred to as the “first-mentioned property”) falls to be determined for the purpose of section 28(4), (or of an appeal from a decision under that section) that determination shall be made by reference to the values, as appearing on the valuation list relating to the same rating authority area as that property is situate in, of other properties comparable to that property.

7. APPELLANT’S CASE

7.1 The Appellant was represented by Mr. Donal O’Donoghue of OMK Property Advisors.

7.2 Mr.O’Donoghue commenced the presentation of his case by confirming that he was adopting his evidence-in-chief as submitted to the Tribunal. Having set out the details of the demise, Mr. O’Donoghue alluded to the fact that the marketing for the complex noted it as having a 12,000 sqft gym and he asserted his belief that the unit could not be used as a retail unit even if a hypothetical tenant wished to change the existing permitted use.

7.3 Mr.O’Donoghue also highlighted in his evidence that the entrance to the unit had been moved 180 degrees from Hanover Street (its original entrance and main frontage when it was a retail shop), to Windmill Lane, resulting in little or no passing footfall.

7.4 Mr. O’Donoghue also noted that the Respondents appeared to have valued the subject property based upon its former use as a retail shop, which produced NAV totals as follows:

Supermarket GF 1,018.00 sqms @ €155 per sqm.

Store -1 291.00 sqms @ €50 per sqm

Mr. O’Donoghue stated that the Eurospar supermarket which had originally been located in the subject property had relocated about 50m metres away to a new location still in the same development at the corner of Hanover Street East and Creighton Street and that the subject gym was now operating in Eurospar’s original building.

7.5 Given this change in circumstances, Mr. O'Donoghue stated that this is what had given rise to the revision as being a material change in circumstances and that to continue to base the NAV of the gym on its former use as a supermarket was inequitable to Mr. O'Donoghue. He contended that the property must be valued in its actual state as a gym and in accordance with the tone of the list and in accordance with other similarly classed gymnasium/fitness centre properties in DCC's valuation list. He stated that the current valuation certificate was issued on 10th Nov 2020. He stated that it has planning permission and is operating as a gym. He says it is laid out mainly in open plan with all the usual fittings and equipment found in modern gyms. He stated that the plant room is in the basement accessed via the adjoining offices. He stated that the property is held under a new lease since 2018, the terms of which were varied recently, and which details have been furnished to the Tribunal. He stated that it is the position of Mr. O'Donoghue that this is a tone of the list valuation under s.49.(1) of the Valuation (Amendment) Act 2015.

7.6 Mr. O'Donoghue stated that he had examined the valuation list in Dublin City Council for properties under the classification of Gymnasium/Fitness Centre of which he noted there were a total of 55 gym properties on the list. However, he also noted that the subject property was the only one valued at more than €100,000, which he found alarming. Mr. O'Donoghue stated that further research confirmed that this subject property held a uniquely high NAV, with the exception of one other comparison in Ballsbridge (PN 5022916) which he discounted as non-comparable by reason that it has an indoor heated swimming pool.

7.7 By reference to a sample of higher quantum valuations of similar size gym properties within the DCC list, Mr. O'Donoghue noted that other large gyms were valued at €55 per sqm. and that this is €100 per sqm lower than the level applied to the subject property. Mr. O'Donoghue noted that many gyms are located on more than one floor, yet the Commissioner did not appear to have differentiated on NAVs between different floors and that based on this lack of differentiation there was a discernible trend that the NAV rate for gyms was the tone for gymnasiums, particularly for those of over 1,000 sqms in size. He stated that if they had been dealing with a trading supermarket at the date of assessment that he would have expected all the relevant factors relating to such use to be examined but that in this case what was at issue was a value based upon its present use as a gym, and that it was his position that it was a long established principle and case law that properties had to be valued "rebus sic stantibus" and that this was his contention in this case and that case law and previous Tribunal decisions

introduced by Mr. Shaughnessy in his evidence was instructive in this regard. He could find nothing in Mr. Shaughnessy's evidence that overturned the principle of rebus sic stantibus, and that it had hardened his belief that the property should have been valued as a gym/fitness centre and not retail.

7.8 Mr. O'Donoghue stated in his evidence that there are 4 comparisons which support his contention for an NAV of €55 per sqm, 3 of which are properties over 1,000 sqms, and the fourth is 867 sqms. He proceeded to provide details on these as follows:

Comparison 1 PN5018601 Gymnasium at Donnybrook House, Donnybrook, Dublin 4

Total floor area 1,837 sqms

NAV €87,900, devalued as follows:

Ground Floor - Gymnasium 119 sqm @ €55 per sqm = €6,545

Basement -1 - Gymnasium 1,062 sqm @ €55 per sqm = €58,410

Basement -2 - Gymnasium 656 sqm @ €55 per sqm = €22,960

Say NAV €87,900

Mr. O'Donoghue adjudged that this was an excellent comparison, it also being a larger unit within a mixed-use commercial development like the subject property, and that it supported his contention that no operator would be prepared to pay an NAV rates assessment of €100 per sqm (i.e. in relation to the subject) in excess of an NAV level of €55 per sqm. He stated it was a better more established commercial location, with a wide range of urban amenities and busy from morning to night. This he stated was a good comparison albeit he contended it was superior in many respects to the subject.

Comparison 2 PN2173625 Gymnasium at 1-4 Camden Street Lower, Dublin 2

Total floor area 1,252.84 sqms

NAV €68,900, devalued as follows:

Ground Floor - Gymnasium 15.3 sqm @ €55 per sqm = €841.50

First Floor - Gymnasium 586.93 sqm @ €55 per sqm = €27,709.55

Second Floor - Gymnasium 503.81 sqm @ €55 per sqm = €32,282.25

Third Floor - Gymnasium 146.78 sqm @ €55 per sqm = €8,072.90

Say NAV €68,900

Mr. O'Donoghue commented that this was previously the offices of the Irish Nationwide Building Society until it was redeveloped about 20 years ago, with a supermarket on ground floor, and a gym on the upper floors, all valued at €55 per sqm. He said it was a substantial gym premises with a good centre city location, busy from morning till night and with an NAV of €100 per sqm less than the subject property which would put the operator of the subject at a significant commercial disadvantage.

Comparison 3 PN815386 Gymnasium at 7a Richmond Street South, Dublin 2

Total floor area 866.2 sqms

NAV €47,600, devalued as follows:

Ground Floor - Gymnasium 758.14 sqm @ €55 per sqm = €41,697.20

First Floor - Gymnasium 108.68 sqm @ €55 per sqm = €5,977.40

Say NAV €47,600

Mr. O'Donoghue's comments were that this property also was in a very good established urban commercial/residential setting, within a 10-minute walk of St Stephen's Green/Grafton St and that it was also a substantial premises over two floors, ground and first, and with both floors at an NAV €55 per sqm. He said its total rates bill of €47,600 was a quarter of the rates being levied on the subject building.

Comparison 4 PN2207466 Gymnasium at 57-60 Jervis Street, Dublin 1

Total floor area 1,776.05 sqms

NAV €97,600 devalued as follows:

Ground Floor - Gymnasium 14.05 sqm @ €55 per sqm = €722.75

First Floor - Gymnasium 881.00 sqm @ €55 per sqm = €48,455.00

Second Floor - Gymnasium 881.00 sqm @ €55 per sqm = €49,455.00

Say NAV €89,600

Mr. O'Donoghue's comments were that like his first three comparisons this substantial gym property, previously known as Twilfit House, was in a good mature city centre location with mixed commercial and residential uses. He noted that it is located across three floors, ground, first and second, and that all floors carry an NAV of €55 per sqm, which puts it at €100 per sqm less than the subject property, which again he asserted makes no sense.

Mr. O'Donoghue then referred the Tribunal to the various rating documents attached to his submission relating to the subject property and to the comparisons he had adduced. In particular

he referred to the Valuation Certificate dated 10.11.2020 relating to the Revision Application which stated that the use of the property was as a Gymnasium Fitness Centre. He referred to a copy of the related Planning Permission for the subject property for the change of uses from retail to gymnasium which he said had been granted.

Mr. O'Donoghue the referred to the Lease of the property for the gymnasium. He stated that under the Lease definitions the permitted user shall be as a gym.

Appellant's valuation of NAV

Gymnasium	GF	1,130.90sqms @ €55per sqm = €62,190.50
Stores	-1	125.90 sqms @ €30 per sqm = €3,777.00
TOTAL		€65,976.00
Say		€66,000.00

Cross Examination of Mr. O'Donoghue by Mr. Shaughnessy.

Mr. Shaughnessy queried whether the values for basement space in Georgian buildings, Fitzwilliam Square was instanced, were usually lower than ground floor space to which the answer given was yes, firstly if this question related to office space, but also in general to other uses.

This was followed by a question regarding retail space in Capel Street and whether first floor space was more valuable than ground floorspace, to which Mr. O'Donoghue's valuer's answer was that ground floor space was usually more valuable but specifically in a retail setting.

Mr. Shaughnessy asked Mr. O'Donoghue to confirm that in relation to three of his four comparisons, i.e. Nos. 1, 2 and 4, that these examples included space at both basement, ground and first floor level. Mr. O'Donoghue's answer was yes, qualified by the observation that in those cases there was no distinction by the Commissioner in NAV terms between ground and other floors in the comparisons he had selected. Mr. Shaughnessy's response was that it was unlikely where there was only a small ground floor area serving as an access point that the Commissioner would seek to apply a higher value than the other floors.

Mr. Shaughnessy queried whether or not Mr. O'Donoghue would agree that his Comp 3 was more akin to an industrial property in terms of construction and quality. Mr. O'Donoghue replied he was providing evidence relating to 'tone of the list' properties and that while such properties varied in certain respects, they were all classified as Leisure, and with a specific use as gymnasiums/fitness centres and thus Comp 3 was in his view totally comparable. Mr. O'Donoghue replied, querying whether or not Mr. Shaughnessy made adjustments depending on floor level, to which Mr. Shaughnessy replied that in assessing each property he took account of location, size, shape, configuration and use. In a final comment to the Tribunal Mr. O'Donoghue said he believed the simple problem in this case was that the Commissioner had overvalued the property.

Mr. Shaughnessy asked O'Donoghue to confirm whether all four of his comparisons in his precis were ground floor properties, which Mr. O'Donoghue duly confirmed. Mr. Shaughnessy's then queried what was the NAV rate per sqm relating to Mr. O'Donoghue's first comparison in Donnybrook House, specifically for an adjoining ground floor unit. Mr. O'Donoghue first confirmed that the ground floor section of the comparator property in Donnybrook House was at an NAV of €55 per sqm but went on to assert that the value of an adjoining unit in retail/office use was irrelevant. Mr. O'Donoghue referred Mr. Shaughnessy back to the definition of Nett Annual Value and that the property must be valued "in its actual state." In the case of the subject property at 1 Windmill Lane Mr. O'Donoghue reiterated that its previous use until conversion to gym use was a retail unit. Mr. Shaughnessy queried the value relationship between ground floor and other floors, to which Mr. O'Donoghue reiterated that under the legislation a valuer was obliged to value a property in its current state - *rebus sic stantibus*. He also stated that it had established planning permission for its current use as a gymnasium and that the Valuation Office had on at least two occasions in its documentation referred to it as such.

Mr. Shaughnessy then queried the instance of a property which has its use changed through planning and whether this amounted to a material change of circumstances (MCC). Mr. O'Donoghue said he had often seen this situation arise but that whether or not planning permission was required would depend on the extent of physical change involved to the building.

Mr. Shaughnessy agreed with Mr. O'Donoghue that a return to retail use would require a fresh planning permission. Mr. Shaughnessy then asked whether or not planning requirement in itself would constitute a material change in circumstances (MCC). That whether or not planning was required would depend on the nature of the change, changes in area or not, moving of doors, changes in fire safety certification etc.

Mr. Shaughnessy asked Mr. O'Donoghue if he would agree that internal changes need not necessarily require an associated planning permission for a change of use. Mr. O'Donoghue agreed that in some circumstances this might be so but not necessarily.

Mr. Shaughnessy asked Mr. O'Donoghue to confirm whether the owners of the subject property and building had changed the location of the main access from Lombard Street East to Windmill Lane which Mr. O'Donoghue answered in the affirmative. Mr. Shaughnessy said that this change of entrance had allowed the subject property to face directly onto four offices located directly across the street and thus represented a benefit to the gym business (rather than this change of entrance making no material difference). Mr. O'Donoghue rejected the suggestion that the entrance change was of any benefit to the subject property and stated as the reverse situation applied here. Queried on what he was basing his contention, Mr. O'Donoghue's reply was that it was logical to expect that in simple commercial terms a 'Street' is busier than a 'Lane'. He pointed out that Hanover Street East (the location of the original main entrance) runs from Townsend Street to Grand Canal Dock. Mr. O'Donoghue observed that the Eurospar shop had chosen to relocate to the optimal commercial location available in the locality, that being Hanover Street East, whereas under Mr. Shaughnessy's claim that Windmill Lane was busier they would have moved there. When asked by Mr. Shaughnessy what he had based this logic on Mr. O'Donoghue replied that it was based on his 26 years' experience in the property market. In contrast he asserted that a lane would not have an equal level of footfall to that of a street – which he felt in his view was totally implausible.

Mr. Shaughnessy then referred to Mr. O'Donoghue's 'tone of the list' properties – amounting to 55 gym properties in the Dublin City Council area. He asked Mr. O'Donoghue how much analysis he had carried out on the top 10 properties on this list. Mr. O'Donoghue's answer was that he had selected those with the highest NAV value. Mr. Shaughnessy then asked how many of the top 13 properties on the list were located at ground floor level. Mr O'Donoghue said he did not know to which specific properties Mr. Shaughnessy was referring. Mr. Shaughnessy

said it was three properties including the subject property. Mr. Shaughnessy stated the other two were gyms, the first in Finglas which had an NAV of €80 per sqm, and the other in Docklands which was valued at €160 per sqm. He said that all other gyms on the list were either at basement level or on floors 1 2 or 3. Mr. Shaughnessy queried whether Mr. O'Donoghue would accept this as a fact but Mr. O'Donoghue was not prepared to do so as this had not been included in Mr. Shaughnessy's precis of evidence. Mr. Shaughnessy then sought the Tribunal's agreement to put forward further details of the above-mentioned comparisons. The Tribunal agreed that this information could be included as evidence. Mr Shaughnessy listed the following cases:

PN2211860 NAV €160. Docklands – contained in Respondents Appendix 2 – page 36 (n/a to public). Total rates €53,800. Mr. O'Donoghue responded to this comparison saying is part of a much larger complex with a 400m asphalt running track, pitches, and other facilities and is not wholly comparable. It has a total size of 446 sqms. The property faces Ringsend Road and has a direct street presence.

PN 5020552 NAV €80 per sqm Industrial unit in Finglas. Under Tribunal questioning it was verified that it was not on either Mr. O'Donoghue or Mr. Shaughnessy's respective 'tone of the list' tables. Thus, the Tribunal determined that it could not be introduced as evidence. Mr. Shaughnessy accepted this also given that Mr. O'Donoghue had not been afforded an opportunity to examine it before the hearing.

Mr. Shaughnessy explained that in all cases he put forward as evidence, he always endeavoured to include all factors that would as a totality determine their value. He then turned to the previously referenced item of 'rebus sic stantibus' and said he had compiled a number of relevant cases. He referred to two such cases which he considered to be seminal:

1. The Walley case.
2. The Harper Stores v the Commissioner case. The Tribunal ascertained from Mr. Shaughnessy that the Harper Stores case had not been put into evidence and could therefore not be considered. The Respondent was asked to move on to discuss the Walley case. Mr. O'Donoghue interjected with additional information on the Walley case, pointing out that this was a Case Stated by the Tribunal which went to the High Court at which stage due to financial constraints the case was withdrawn by the appellant. Mr. O'Donoghue chose instead to rely on another case stated – the PF O'Reilly case which involved a shop property, valued on that basis, that changed to

office use, and in that case, it appears that having attended the first day's hearing in court, the Commissioner withdrew. As a result, Mr. O'Donoghue argued that the Walley case had reduced to a matter of settlement of costs. Mr. O'Donoghue then stated he had been unsuccessful in obtaining copies of two cases, either the Walley case and the Dayhoff case, from the Tribunal. The Tribunal Chair then clarified that the Walley Case Stated was not proceeding to the High Court with the result that the Tribunal decision still stands. The Chair stated that the same situation applies in the PF O'Reilly case which was also withdrawn and where consequently the Tribunal decision still stands. Mr. Shaughnessy asserted that having regard to these cases, that past and future potential uses can be relevant to a valuation, on foot of which he asserted that the previous retail use in the subject case is relevant and asked Mr. O'Donoghue agreed with that assertion. Mr. O'Donoghue agreed, on the basis of the Walley case, that they could be.

Mr. Shaughnessy asked if Mr. O'Donoghue would agree with the findings of the Dayhoff case in relation to past and potential future uses. Mr. O'Donoghue responded with a conditional agreement to the extent, quoting a concluding sentence in paragraph 51 of that decision, that the Tribunal was correct in that it should not close its eyes to relevant evidence, being the pre-MCC values of the properties, albeit that the evidence will vary in weight depending on what existed pre-MCC and what is the nature of the property post MCC. Mr. O'Donoghue reverted to the preceding ~~para, para~~ 50 where it quotes Terry Dineen in an earlier case, Pfizer, on the same page as paragraph 51, that all evidence is relevant but most weight must be given to that comparison or comparisons which most closely resemble the property to be valued in terms of location, nature of construction, design, configuration and use. Mr. Shaughnessy thanked Mr. O'Donoghue for this quote which he said perfectly accorded with the approach taken by the VO in that they have valued the subject property in terms of its location, its method of construction and for the Tribunal to note that this building has a LEED gold rating which includes the subject property, and which puts it as one of the highest quality developments. Mr. O'Donoghue was again asked if he was considering all factors or just use. Mr. O'Donoghue responded by directing the Chairman to the Walley case, saying that he was going to quote from one of the judgements to demonstrate the approach that a valuer must take – that he must take the premises in their actual state but since the actual state can connote the premises as it stands with all its potentialities and disabilities may have to look at the past present and future. In the present case Mr. O'Donoghue stated that he had looked at the premises with its

potentialities but that he had also considered the disabilities and disadvantages and those disadvantages included the fact that it would require planning permission to revert to retail and that there was a risk that the landlord might not consent to that change of use. He said there was also a risk in the hypothetical tenant's mind that he might not get planning consent for retail, and that the planning authority might decide there was too much retail. He also stated that the landlord might decide, for good estate planning reasons, there was too much retail in that location. Thus, he said his opinion was that those disadvantages far outweighed speculation as to what might be in the future and that predicting what might happen was of limited value. In short he stated that is his opinion it was the actual state that counted, which he said was supported by the Walley case and by Mr. Shaughnessy's other (Browne) case. In his follow-up question Mr Shaughnessy asked Mr O'Donoghue to refer further to the Browne case as he said it also stated that the property should be valued in accordance with its use at the valuation date and he asked Mr. O'Donoghue to confirm the valuation date. Mr. O'Donoghue said did he mean the valuation of date of April 2011 to which Mr. Shaughnessy replied yes. Mr. O'Donoghue said that at that date it was in use as a retail unit. He confirmed that as a retail unit, it carried an NAV of €155 on the Valuation list.

Mr. Shaughnessy moved on to Mr. O'Donoghue's precis and an image of the subject premises in the context of use, change of use and disadvantages, he stated that the Commissioner looks at gyms as being purpose-built and that this was why they carried a special rate. He asked Mr. O'Donoghue in reference to the image of the interior of the gym what changes would be required to convert it to a commercial use, i.e. a retail, allowing that in its present gym use it has a coffee shop operating within it. He explained that he was asking for the type of structural changes, asserting that if it was only planning permission that the cost of such application was only €250 and limiting its potential so severely. Mr. O'Donoghue stated that whilst he was not a chartered building surveyor or architect, he felt it would require a team of such professionals, new fire certification, new disability access certificate, the usual fitout items such as freezers, depending on the use. Mr. Shaughnessy said, referring to photos within his own precis that other than the gym machines, the premises was a black box. Mr. O'Donoghue clarified that what he meant was a reversion to shell and core state, and when questioned as to whether the removal of the gym machines was the extent of the physical works needed to effect a change of use said he did not disagree with Mr. Shaughnessy's contention.

Mr. Shaughnessy said he was looking for a copy of the revised lease referred to by Mr. O'Donoghue, and the latter confirmed he had sent a copy of same and other lease related documentation to the Tribunal a week before the hearing. Mr. O'Donoghue confirmed that at the date he submitted his precis in early January there had only been unsigned versions, which had been signed subsequently.

The Chairman enquired whether the unsigned and signed version were identical, other than signatures, and the reply was that there was no difference.

The Chairman asked in relation to the subject property whether it was physically better than some of the comparisons. Mr. O'Donoghue said that in his view, with the exception of Twylfit House premises in Jervis Street, that the remainder in his view were of equal quality physically but in the broader context that many gyms were in secondary locations. He commented that gym users were not necessarily drawn to luxury premises, and that gym operators are not high value rent payers and that there is a lot of wear and tear on the premises and machines, and that they do not have a preference for ground floor level over basement or first floor.

8. RESPONDENT'S CASE

8.1 The Commissioner of Valuation was represented by John Shaughnessy, Valuer.

8.2 Mr. Shaughnessy commenced the presentation of the Respondent's case to the Tribunal, confirming that he was adopting his written evidence-in-chief.

He summarised the facts which he described as clear, and which he stated, "enabled the interpretation of issues more clearly." He listed the issues which he regarded as relevant as being:

1. The subject property was redeveloped whereby the ground floor area had increased, and basement area had decreased.
2. The whole building including the subject property achieved the LEED Gold award following redevelopment, putting it into an A3 energy category. He stated it comprised 4 properties in total the first being the subject property, the second the relocated spar supermarket and two other office blocks facing directly onto the quays.
3. The previous retail occupier of the subject unit, Eurospar, had moved to the opposite corner of the same development (i.e. also on the same Hanover Street East frontage (PN 5015513, Comp 2). This move and the redevelopment of the vacated Eurospar premises, i.e. the subject property, had involved physical works to the property to

remove a carpark ramp to basement, a relocated ESB substation, and access to the basement storage area now being via the adjacent building and the main access now being located onto Windmill Lane. In all, he stated that these works had given rise to a small increase in floor area of about 81 sqms. Given its high energy classification he stated that this confirmed that the property was superior in quality to any of Mr. O'Donoghue's comparisons, including Donnybrook House or indeed on Mr. Shaughnessy's remaining list.

4. That a change of use had been sought and granted for the subject property by the landlord to Dublin City Council – from retail to gym. He confirmed that this was a material change of use.
5. That the Revision process takes account of the change in areas and the final valuation certificate. He stated that the relocation of the shop was to facilitate the overall redevelopment by the landlord, rather than being driven by a commercial business decision on the part of the shop. He stated that he worked off plans submitted by the developer, and that he had made a minor adjustment to the size of the basement area resulting from the internal changes. He also claimed that the recent internal/structural changes to shell and core could be reversed in the future if required to retail, that there was continuing dual access and that the building was of very high quality
6. That the occupier of the subject had lodged a Notice of Appeal, noting that the use of the subject property as a gym warranted a reduction in NAV rate per sqm. By way of context,
7. Mr. Shaughnessy reprised the rating history of the subject property from 2009, through the 2011 revaluation and continuously thereafter to 2019 at an NAV of €155 per sqm as a retail unit, when the Revision was carried out by the VO following the subject's change of use to a gym, and no reps having been received, an NAV of €155 per sqm was again placed upon the property by the VO, and thence to the present appeal to the Tribunal with Mr. O'Donoghue seeking a reduction in NAV to €55 per sqm. but without a full breakdown (the figure of €55 per sqm was not accepted by the VO.) He further stated that the business of the subject property was advertised in all of the adjoining office blocks, meaning it had good exposure to local clientele. In relation to the relative commercial advantage of a street versus a lane location, he did not believe that a differential existed in this case. He reiterated the commercial benefit to the property of being in close proximity to a number of offices, thus obviating any commercial difference between 'Street' and 'Lane'. He also stated that the property could be

changed back to retail without difficulty with the requisite planning permission, saying it would have been different if it were a leisure centre with a swimming pool. He noted that the property with the highest NAV at Eden Quay, had been excluded by Mr. O'Donoghue (which Mr. Shaughnessy agreed with) mainly because it included a swimming pool. Referring again to the fact that Mr. O'Donoghue had excluded the subject property because it was no longer a retail unit, Mr. Shaughnessy referred to the Browne case and the importance/significance of the Valuation date which he asserted also tied in with the Walley case and the Harper Stores case in terms of past, present and potential future use. Mr. Shaughnessy referred to the Dayhoff case, referring to that decision being important in that it validated his contention that it was appropriate to use the subject property as a comparison, especially since the physical changes had been small.

8. Turning to Mr. O'Donoghue's comparables, he noted that only one of those relates to a ground floor unit, which he stated the Commissioner would consider an industrial unit. Referring to Mr. O'Donoghue's other three comparables, Donnybrook, Camden Street and Jervis Street he said that the respective NAVs relating to the ground floors, were respectively €130, €165 and €165 per sqm. He stated that the small ground floor section had been valued at €55 per sqm as it only served as an access point. Mr. Shaughnessy stated that in his view Mr. O'Donoghue had not put forward comparable properties. Turning to Mr. O'Donoghue's reference in his precis to DCC's list of gym properties, he dismissed one of these as being non-comparable, PN2203384, a gym located at basement level in a Georgian office building. He instanced another gym property, PN799777 Flyfit Hanover Street East, which he said he noted was not on Mr. O'Donoghue's list, which he categorised as being an industrial unit, (i.e. not a LEED building) and with a galvanised roof, with a base rate of €45 per sqm. Whilst close to what Mr. O'Donoghue is claiming as an appropriate NAV for the subject unit, he said this is not comparable and that the subject unit is of far higher quality and is also in a better location.

Mr. Shaughnessy then referred to his 4 comparisons:

Comparison 1 PN2198975 Eurospar (Subject Property prior to Revision), Hanover Building, 2WML, Windmill Lane, Dublin 2

Total floor area 1,309.00 sqms

NAV €182,300, devalued as follows:

Ground Floor – Retail 1,018 sqm @ €155 per sqm	
Basement -1 - Store 291 sqm @ €50 per sqm	
Off-licence	€10,000
NAV	€182,300

Mr. Shaughnessy said that he considers that this is the most comparable property to the subject. He referred to the Dayhoff case insofar as that affirms that it is acceptable to use the same property in its former use as a retail unit as a comparison. He stated that there is a myriad of examples where the Commissioner has cited the subject properties but in previously different uses as being relevant evidence of comparability. He reiterated that the extent of physical changes was relatively minor internally in terms of the unit's size although a substation had been relocated, and access to basement car parking had also been moved.

Comparison 2 PN5015513 Eurospar, 20 Creighton Street, part of 1WML, Windmill Quarter, Dublin 2.

Total floor area 1,060.87 sqms

NAV €110,200, devalued as follows:

Ground Floor – Retail 605 sqm @ €155 per sqm	
Ground Floor - Store 130 sqm @ €50 per sqm	
Off-licence	€10,000
NAV	€110,200

Mr. Shaughnessy said he considers that this is also a comparable property to the subject, given that the occupier is the supermarket that relocated from its previous location in the subject property to a proximate location under a deal with the landlords as part of the overall redevelopment of their Windmill Lane property. He said this had also been valued at €155 per sqm and this was evidence of the equity of the list and that Eurospar was still prepared to pay this rate. Taking the corollary situation, he stated that if the gym unit reverted to retail and had established an NAV of €55 per sqm whilst in gym use, then this would prejudice the equity of rates for the Eurospar in its new location about 50 metres in the same block. He stated that this is the nub of his contention for the rate of €155 per sqm to remain the NAV for the subject property.

Comparison 3 PN814713 Fly-fit Ltd., 8-10 Harrington Street, South Circular Road, Dublin 8.

Total floor area 1,534.55 sqms

NAV €152,100, devalued as follows:

Basement -1 Lounge 174.77 sqm @	€110 per sqm
Basement -1 Store 35.60 sqm @	€110 per sqm
Ground Floor – Hall 330.61 sqm @	€70 per sqm
Ground Floor – Lounge 43.21 sqm	@150 per sqm
Ground Floor – Stores 115.43 sqm	@150 per sqm
First Floor – Hall 287.15 sqm @	€50 per sqm
First Floor – Kitchen 44.66 sqm @	€70 per sqm
First Floor – Offices 153.39 sqm @	€130 per sqm
First Floor – Stores 40.20 sqm @	€130 per sqm
Second Floor – Bedrooms 174.85 sqm @	€110 per sqm
NAV	€152,100

Mr. Shaughnessy said that he noted that whilst this property, like the subject property, is now in use as a gym, it functioned until recent years as the Garda Social Club. Mr. Shaughnessy asserted that this comparison validates his contention that a reduction in NAV will not automatically apply even if the use changes. He stated that the gym at ground floor level in the property has an NAV of €150 per sqm.

Comparison 4 PN840180 Tesco, 15/16 Baggot Street Lower, Dublin 2.

Total floor area 1,366.00 sqms

NAV €176,200, devalued as follows:

Ground Floor – Supermarket 550.00 sqm @	€170 per sqm
Ground Floor – Store 236.00 sqm @	170 per sqm
First Floor – Offices 52.00 sqm @	€120 per sqm
Basement – Store 528.00 sqm @	€50 per sqm
Off- Licence	€10,000
NAV	€176,200

Mr. Shaughnessy noted that this property is a medium-size ground floor retail unit (in the same size category as the subject of 500-2,500 sqm) with a ground floor rate of €170 per sqm. Mr.

Shaughnessy that the first floor, which operates as a gym has a lower NAV rate of €120, which he stated is evidence of reduced NAV values for upper floors.

Mr. Shaughnessy set out his NAV assessment as follows:

Retail – supermarket GF	1,130.90sqms @ €155per sqm =	€175,289.50
Store (reduced size) -1	50.00 sqms @ €50 per sqm =	€250.00
TOTAL	1,180.90 sqms	€177,789.50
Say		€177,700.00

Mr. Shaughnessy further stated in relation to his valuation, that he rejected Mr. O'Donoghue's value of €55 per sqm for the ground floor, and also rejects the value of €30 per sqm for the basement area, stating that Mr. O'Donoghue had submitted no evidence to support these values, whereas Mr. Shaughnessy had stated that he had provided supporting evidence of his figures.

Cross Examination by Mr. O'Donoghue of the Respondent's witness, Mr. Shaughnessy.

Mr. O'Donoghue asked, in reference to the cover page of his precis, whether the Commissioner was contending for an assessment of the subject property under the category of Retail/Leisure, and whether in effect the Commissioner was appealing his own valuation to which Mr. Shaughnessy responded in the negative.

Mr. O'Donoghue asked whether Mr. Shaughnessy would agree that the assessment of the subject property should be based on Tone of the List. Mr. Shaughnessy replied that it was based upon comparable properties on the Valuation List. Mr. O'Donoghue then asked about the term 'comparability'. Mr. Shaughnessy further confirmed that the assessment of the subject property in terms of 'comparability' meant comparable in terms of type, irrespective of use.

Turning to the references to LEED and BER ratings, Mr. O'Donoghue asked Mr. Shaughnessy to state what these ratings were prior to redevelopment. Mr. Shaughnessy's reply was that he had no information on this detail, but that the subject was now an energy efficient building. In answer to a further question about its predevelopment energy efficiency rating Mr. Shaughnessy conceded that there was no information to assist the Tribunal on that point.

Mr. O'Donoghue asked Mr. Shaughnessy to confirm that there was no reference to "use" in his precis, to which the reply was that it was on his cover page. Mr. O'Donoghue stated that whilst he accepted this, there was no further reference in the body of Mr. Shaughnessy's report.

Referring to Mr. Shaughnessy's description of the property, and in particular an internal photo showing a view towards Lombard Street East, Mr. Shaughnessy was asked if the picture showed that this was only a fire escape, to which the reply was yes, but that in addition it also showed two large windows.

Referring to the Lease, Mr. O'Donoghue asked why there was no reference to the permitted user. Mr. Shaughnessy was asked to identify the section in the lease dealing with permitted user. Mr. Shaughnessy confirmed that under the lease the permitted user was a gym.

Mr. O'Donoghue, referring to clause s4.16 (a), asked Mr. Shaughnessy to read this section which referred to permitted user. Mr. Shaughnessy complied. Mr. O'Donoghue noted that in what had been read out, this confirmed that its user was as a gym, with the provision that a change of user to another use would not be unreasonably withheld by the landlord. In answer to a further question, Mr. Shaughnessy confirmed that any change of user would require the landlord's consent. Mr. O'Donoghue referenced a comment in Mr. Shaughnessy's precis about that point. Mr. O'Donoghue then asked Mr. Shaughnessy if he believed that landlord's consent would amount to a problem in the hypothetical tenant's mind i.e. that a change of user might not be achievable and Mr. Shaughnessy replied that in his view it would not. When further asked about the potential uncertainty about a future change of use, the response was that Mr. Shaughnessy did not accept that this was a major uncertainty, given the example of the relocation of the Eurospar by agreement to a proximate location in the same development which could potentially be replicated in a similar future relocation move of the gym, if deemed appropriate by the landlord. Mr. Shaughnessy contended that Mr. O'Donoghue was adopting what he described as 'tunnel vision' in assuming the narrowness of potential uses for which the subject property could be suitable, given that the planning for the gym was only a single condition with the planning for the overall development. Mr. O'Donoghue then asked Mr. Shaughnessy to confirm that not only was it necessary to obtain a change of use to gym, that if this were to revert to retail in the future it would also require a similar planning permission. Having answered yes, Mr. O'Donoghue asked Mr. Shaughnessy if he did not consider this an impediment to the hypothetical tenant. The response was no, whereupon Mr. O'Donoghue

asserted that he had encountered situations when the obtaining of planning permission was problematic. Mr. O'Donoghue referenced a comment in Mr. Shaughnessy's precis about the Coffee Dock in the subject property being evidence that a different use would not be problematic and put it to Mr. Shaughnessy that this was a subsidiary/ancillary use within the gym rather than a separate use and it was not a sublease. The Tribunal observed that it was noted that under the Lease the entire could be sublet rather than a portion thereof.

Mr. Shaughnessy agreed with Mr. O'Donoghue that all the marketing material for the subject property was as a gym. the presence of the gym represented a positive amenity to the adjacent properties/users occupying about 400,000sqft. In a follow-up question Mr. O'Donoghue asked Mr. Shaughnessy if he would agree that a change of use back to a retail use would be not agreed to by the landlord, given that the gym had been a major selling point by the landlord. Mr. Shaughnessy said he did not agree that with the possibility that the landlord might not at a future date seek to further relocate the gym, to which Mr. O'Donoghue's response was that what is at issue in this case is the actual status of the property now, rather than potential future changes. Mr. Shaughnessy said he did not agree that a further potential change in the location of the gym might be problematic to the overall development.

Mr. O'Donoghue noted to the Tribunal there was obviously disagreement about footfall and the difference between a Lane and a Street and that, given this disagreement he was not going to go over this point.

Mr. O'Donoghue then asked Mr. Shaughnessy how a hypothetical tenant might view making an offer for retail user at an NAV rate of €155 per sqm, for a supermarket, where a planning permission was not in place for same. Mr. Shaughnessy said he was confident that a hypothetical tenant would be prepared to pay an NAV of €155 per sqm to which Mr. O'Donoghue's response to this answer was yes, but with the obvious caveat that hypothetical properties were of the same type and quality and on the same floor level. Mr. O'Donoghue asked Mr. Shaughnessy to confirm to the Tribunal that it was his contention that the subject should be valued as a supermarket in the range of 500 -2500 sq. metres. Mr. Shaughnessy replied, saying it was his opinion that Mr. O'Donoghue was attempting to 'pigeonhole' the categorisation of premises, trying to make the argument that each property in terms of description had to be an exact comparison in every way, as opposed to looking at each building holistically.

Mr. O'Donoghue stated he was moving on to what he considered to be the core issue. He raised the Browne case which Mr. Shaughnessy had already mentioned. He asked if Mr. Shaughnessy would agree that this was a Tribunal decision based on a revaluation by Kildare County Council and specifically that it was a revaluation not a revision. Mr. Shaughnessy replied yes. Mr. O'Donoghue asked Mr. Shaughnessy to agree that a revaluation is a countywide revaluation, involving all rateable properties and taking into account market rents as of the valuation date. Mr. Shaughnessy agreed this was correct. Mr. O'Donoghue asked Mr. Shaughnessy if he would agree that the valuation date was very important to which the answer was again yes. Mr. O'Donoghue then asked Mr. Shaughnessy to confirm the effective date in the subject case. Mr. Shaughnessy confirmed the effective date was 20th November 2020. Mr. Shaughnessy was then asked to confirm the importance of the 2020 date with reference to the Valuation date. Mr. Shaughnessy replied that the state of the property at that date in 2020 had to be taken into account with reference to the valuation date. Mr. O'Donoghue stated that Mr. Shaughnessy's answers to his previous questions had related to the use of the property at the valuation date, and what planning permission it had at that date. Mr. O'Donoghue asked M. Shaughnessy if it was the case that at the effective date (in Nov 2020) the subject property had planning permission for a gym, to which Mr. Shaughnessy Mr. Shaughnessy replied that the user/occupier in November 2020 was described as a gym.

Mr. O'Donoghue then asked Mr. Shaughnessy to confirm, by reference to the Valuation Certificate what use was attributed to the subject property to which Mr. Shaughnessy answer was leisure/gym. Mr. Shaughnessy was asked by Mr. O'Donoghue to confirm it was actually described as a gymnasium/fitness centre, again the answer was yes.

Mr O'Donoghue then stated that he noted that Mr. O'Donoghue had put forwards the Dayhoff case, a High Court decision from 2020, in support of his case. Mr. O'Donoghue then asked him to quote directly from the Dayhoff decision, para 51, where it said: "In essence the Tribunal was correct in stating that it should not shut its eyes to the relevant evidence, being the pre MCC values of the property, albeit that the weight of the evidence will depend upon what the pre-MCC evidence was and the nature of the property post MCC". Mr O'Donoghue then asked Mr. Shaughnessy, in relation to the post-MCC 'nature' of the subject property, what regard had he taken of its nature. Mr Shaughnessy's answer was that he had regard to firstly to a change in the area, what the property looked like in terms of its core and shell but primarily its reduced

size in sqms at basement level, and an increase in area at ground floor. Mr. Shaughnessy stated that the Valuation Office did not look specifically at the particular user but rather at the nature of the revision from pre to post MCC in terms of physical changes to the area, irrespective of what went on in the premises. Mr. O'Donoghue asked Mr. Shaughnessy to confirm that in arriving at his NAV value he had ignored the use, to which the answer was yes.

Mr. O'Donoghue referred again to the High Court decision which cited other cases, and referring back to the paragraph in the Dayhoff case he had already quoted from the Pfizer case VA 05/3/054, he again quoted the relevant section this being "that all evidence is relevant, but most weight must be given to that comparison or comparisons which most closely resemble the property to be valued in terms of location, construction, design, configuration and use." Mr. Shaughnessy was asked if the Tribunal was wrong in that statement or was the Valuation office correct. Mr. Shaughnessy withdrew his previous statement that he had ignored the use, but that the weight he put on the use, based on what was in it and how it was designed and built, that he had put little value on that use compared to the other elements of value i.e. design, type of building etc. He said that the machines and superficial interior changes meant that if these were removed, back to a 'shell and core' condition, the premises could be used for anything. Mr. O'Donoghue's response was that this was not correct, and that any change would need planning permission which he said was fraught with risk. Mr. O'Donoghue then repeated his query to Mr. Shaughnessy to confirm that there was a risk associated with a change of use requiring planning permission to which Mr. Shaughnessy replied yes. When asked if there was a chance that the planning authority might reject a planning application, Mr. Shaughnessy said that that was a hypothetical question, to which Mr. O'Donoghue's response was that the whole area of rating valuation was itself hypothetical in nature.

Mr O'Donoghue then directed Mr. Shaughnessy to the findings and conclusions of the Browne case, asking for a summary of that case and how Mr. Shaughnessy believed it supported his arguments in the subject case. Mr. Shaughnessy's answer that it was his contention that it was the decision of the Tribunal that it mentioned, that when looking at the use, that the past use, and the use at the valuation date, irrespective of the hypothetical use, has to be examined. When asked by Mr. O'Donoghue which part of the decision he was relying on Mr. Shaughnessy stated that it was 10.3. which stated that at the valuation date it had planning as a gym. He further stated that in the subject case at the valuation date in 2011, it had planning permission for retail and that at the effective date (2020) it had planning for a gym and was being used as a gym.

Mr. O'Donoghue reiterated that in a revision case, the valuation date is immaterial and that the relevant date is the effective date.

Mr. O'Donoghue asked Mr. Shaughnessy to read s8.6 from the Browne case. Mr. Shaughnessy queried Mr. O'Donoghue whether this was a question. Mr. O'Donoghue stated that he was attempting to understand the relevance of the Browne case that had been cited by Mr. O'Donoghue, stating that it related to a property in Naas, Co. Kildare that had been revalued and that the Commissioner had tried to value it as an office when in fact it was a gym. It had permission for a gym and was used as a gym and Mr. O'Donoghue claimed that the parallels with the subject case were remarkable. i.e. that at the effective date in 2020, the subject property was in use as a gym and had planning permission for a gym, the lease was for a gym yet similarly in this case the VO is trying to value it as a shop. He further asserted to Mr. Shaughnessy that in his view the VO was trying to 'shoehorn' in all the comparisons provided as comparative evidence even properties which were in retail use. He repeated his basic question as to how s8.6 of the Browne case supported the VO's contentions in the subject case. Referring to the Commissioner's Valuer who dealt with that case, Mr. O'Donoghue noted that the valuer concerned had reportedly said he might have taken a different approach had he been aware of the planning situation at the outset. He advised the Chairman that he believed the valuer's comment in that case was relevant and instructive.

Turning to the Dayhoff case Mr. O'Donoghue asked Mr. Shaughnessy why he considered that that case was noteworthy and instructive in the subject case. Mr. Shaughnessy replied that the Dayhoff case involved the amalgamation of two properties. Mr. O'Donoghue queried what were the uses on those two properties. As Mr. Shaughnessy said he did not know Mr. O'Donoghue informed him that the amalgamation concerned a restaurant and a bar which were being altered to a bar restaurant. So he asked Mr. Shaughnessy if he would agree that their uses were comparable and there was no major change in the use pre MCC and the use post MCC. Mr. Shaughnessy stated that he accepted the fact that that the Tribunal in that case had accepted that there was not much change. Mr. O'Donoghue asked Mr. Shaughnessy to confirm once more that the Tribunal's view in the Browne case on that point was correct to which he said yes. Moving on from that case to the subject property, Mr. O'Donoghue asked Mr. Shaughnessy to agree that in the case of the subject, its use had changed from supermarket/retail to gymnasium/fitness/leisure centre. Mr. O'Donoghue then questioned whether Mr. Shaughnessy was cognisant with s.63 of the Valuation Act as regards the presumption of the

correctness of the Valuation list. Mr. Shaughnessy said that he was aware of that section and on that basis Mr. O'Donoghue asked him whether he would agree that the details contained in the Valuation reports relating to the subject property were correct to which Mr. Shaughnessy replied yes.

Mr. Shaughnessy drew Mr. O'Donoghue's attention to pictures of the subject property which he had included in his precis of evidence. The pictures were of a gym in a Georgian building in Merrion Square and another on Hanover Street East which the Mr. Shaughnessy said were on Mr. O'Donoghue's 'tone of the list' of gym properties in the DCC area. Mr. Shaughnessy claimed their inclusion was to enable him to provide commentary on the manner on which they were valued by the VO, which was more in accordance with their building type than in terms of their use as gyms, and that it was an approach which did not mean simply putting a standardised figure of €55per sqm on every gym property.

Mr. O'Donoghue responded to Mr. Shaughnessy's answer by stating that as a valuer he was using the list provided by the VO's valuer rather than putting his own list together and that when valuing the subject property, he had adopted the VO's list of 55 gym properties as a logical starting point. Mr. Shaughnessy agreed that while it provided a good starting point it was not a finishing point.

Mr. O'Donoghue asked Mr. Shaughnessy, that having agreed that the VO list was a good starting point, that the first step would be to identify those gym properties of similar size. Mr. Shaughnessy affirmed this approach adding that the floor level was also important.

Mr. O'Donoghue asked Mr. Shaughnessy if he would agree that typically gyms are located in lower value locations. Mr. Shaughnessy said he disagreed completely with that assumption and that as one example, it did not accord with the location of the gym in Camden Street which he said is a high value location. Mr. O'Donoghue stated that that gym which is on upper floors actually had a valuation of €55 per sqm. He then stated that he would question if had that gym been located at ground floor level would it have been valued by the VO at €55 per sqm, but then admitted this was only a rhetorical question. Mr. Shaughnessy then affirmed that that the Camden Street gym property had a value of €55 per sqm. When asked why this was so he stated that this was because it was located at 1st, 2nd and 3rd floor levels. When Mr. O'Donoghue put it to Mr. Shaughnessy that a portion of the gym was on ground floor level, why was it that this

was also set at €55 per sqm. Mr. Shaughnessy's answer was that possibly the Commissioner was being "nice" to that user. Mr. O'Donoghue put a further question to Mr. Shaughnessy asking him to confirm there was no value differential between 1st floor and 2nd. Floor NAV. Having obtained the answer no, Mr. O'Donoghue repeated the same question in relation to the NAV for the 2nd and 3rd. floors. Again, Mr. Shaughnessy said the NAV levels of these floors were the same.

Mr. O'Donoghue turned to his own comparisons, he referred to Comp 1, (Donnybrook House), asking Mr. Shaughnessy, with reference to the Valuation list, if it was a fact that this property was also laid out over 3 floors, i.e. ground floor level and two levels of basement. Mr. Shaughnessy's answered yes. Mr. Shaughnessy then provided further explanation for an equal NAV rate being placed on the ground floor areas of Mr. O'Donoghue's Comparison 1 (Donnybrook), and Comparison 2 (Camden Street), as was placed on the upper or lower floors, saying that in each case the ground floor only provided access to the main gym floors, i.e. either above or below the ground floor level. Mr. O'Donoghue asked Mr. Shaughnessy to confirm there was no differential in the NAV as between Ground, Basement Level 1 and Basement level 2 of his Donnybrook comparison. Mr. Shaughnessy confirmed this but noted that the lowest level contained mainly plant.

Mr. O'Donoghue moved to discuss his Comparison No. 3 - South Richmond Street. He asked Mr. Shaughnessy to confirm that this property was a purpose-built gymnasium to which the answer provided was yes. Mr. O'Donoghue asked if Mr. Shaughnessy would agree it has a substantial ground floor and is valued at €55 per sqm. and that the first floor is also valued at €55per sqm. Having received the answer yes, Mr. O'Donoghue then asked Mr. Shaughnessy if he would agree that there was no differentiation in value between the floor levels and that all floors are valued at €55per sqm. Mr. Shaughnessy's reply was yes in the instance of that premises.

Mr. O'Donoghue then referred to his final comparison, a gym at Twylfit House, Jervis Street. He against asked Mr. Shaughnessy to confirm that all 3 floors, ground, first and second, are valued at €55 per sqm. Mr. Shaughnessy confirmed that as per the VO valuation certificate, all floors are valued at €55 per sqm and listed as a gym. Mr. O'Donoghue asked Mr. Shaughnessy to confirm that as per the VO certificate, all floors were classified as gymnasium space to which Mr. Shaughnessy's answer was yes. Mr. O'Donoghue asked Mr. Shaughnessy to confirm that

all floors were valued at €55 per sqm as a gym, including the ground floor, to which his answer was again yes. Mr. O'Donoghue's next query referred to the Twylfit property. He asked Mr. Shaughnessy to confirm that the property was a substantial property of over 1,000 sqms, Mr. Shaughnessy's answer was yes.

As a follow-up question Mr. O'Donoghue asked Mr. Shaughnessy if he would agree that all of his comparator properties were of substantial size and in that respect were all comparable to the subject property to which the reply was yes.

Mr. O'Donoghue's next question was whether Mr. Shaughnessy would agree there was a discernible trend in the valuation of gyms and that they were all typically valued at €55 per sqm. The answer given was qualified acceptance of Mr. O'Donoghue's question, explaining that gym properties of that size not on ground floor level had also been valued at that level. Mr. Shaughnessy in return asked Mr. O'Donoghue to produce evidence of a substantial gymnasium premises at ground floor level with an NAV of €55 per sqm. When pressed by Mr. Shaughnessy, Mr. O'Donoghue stated that he produced such an example, the purpose-built gym Raw Gym property at South Richmond Street of 758 sqms. When Mr. Shaughnessy stated that this comparison did not have the benefit of street access, Mr. O'Donoghue noted that that it too had laneway access, as he said was the case with the subject property on Windmill Lane. Mr. O'Donoghue said that if one were to look at the location of the Raw Gym property in commercial terms, some of the biggest office businesses i.e. potential clients, are located in close proximity.

Turning to Mr. Shaughnessy's comparator evidence - Comparison 1, the subject building prior to the revision - Mr. O'Donoghue asked Mr. Shaughnessy to confirm the property's Category as it appears on the VO's valuation list. The answer given by Mr. Shaughnessy was Retail. Mr. O'Donoghue's next question asked was the category of User to which Mr. Shaughnessy's response was Supermarket.

Moving on to Comparison No. 2, Mr. O'Donoghue stated that this same occupier as Comparison No. 1, having relocated to a new premises in the same development It is located in the same development but about 40 metres distant from the subject at the corner of Creighton Street and Hanover Street East. Mr. O'Donoghue asked Mr. Shaughnessy what the use and category of this property is, to which Mr. Shaughnessy said his answer was the same as with

his Comparison 1 – i.e. a Supermarket (500-2,500sqms under Category 2) and he also confirmed that this is how it appeared in the valuation list.

Comparison 3 – Mr. O'Donoghue asked Mr. Shaughnessy to confirm that this premises was the old Garda Club building on Harrington Street, Dublin 8; Mr. Shaughnessy confirmed this was correct. Mr. O'Donoghue stated that in his view this was a very interesting comparison as, prior to the change to a gym, it was valued as a dance hall, bars, meetings rooms etc. Mr. O'Donoghue asked Mr. Shaughnessy to affirm that a change from club to a gym would not constitute a Material Change of Circumstances (MCC). Mr. Shaughnessy informed Mr. O'Donoghue, checking his reference documents, that the requirement for the removal of a licence constituting an MCC was referenced under Para h. of the Valuation Act which in turn cited the 1883 Licencing Act regarding a situation where a licenced premises ceased to be a licenced premises. On this basis he believed an MCC was required. Mr. O'Donoghue asked Mr. Shaughnessy if an application for an MCC had been made in the case of the former Garda Club property. Mr. Shaughnessy said he had not checked. Mr. Shaughnessy, when asked by Mr. O'Donoghue did confirm it was categorised in the Revision as 'leisure.' Mr. O'Donoghue then stated that he had checked and that its 'use' was a Club/Lounge. When asked if this meant that the property had been valued as a Club/Lounge Mr. Shaughnessy said no and that it had been valued in line with adjoining properties. He said that if it had been valued as a club/lounge it would have been valued on revenues and income, based on turnover and accounts, not on a sqm basis, as were the adjoining properties on that street. When Mr. O'Donoghue asked if that meant that clubs were valued based on turnover, M. Shaughnessy's answer was that it was valued in like fashion to the other properties on that street.

Mr. O'Donoghue asked Mr. Shaughnessy, given that the property is now in use as a gym yet valued in the Valuation List in the category of Club/Lounge, how could it be compared with the subject property. Mr. Shaughnessy's answer was that correctly or incorrectly the property had been described as Leisure Gym, and that it has been valued as it is. Mr. Shaughnessy stated that this comparison was included to show, that like the gym premises in Merrion Square, they do not necessarily have to be valued at €55 per sqm. and that here is an example of a gym which is valued in line with the 'tone of the list' for adjoining properties, as was the Merrion Square property. He further stated that this comparison was also an example of where the use of 'gym' was not the sole criterion applied to determine the value of that comparator property instead of Mr. O'Donoghue's singular focus on 'use.'

Referring then to Comparison 4, the ‘Tesco’ supermarket property in Lower Baggot Street, Mr. Shaughnessy was asked about its use category to which his reply was that that property was a supermarket of the same size as the subject property. Mr. O’Donoghue also noted that the upper floors of this property were in use as a gym with the supermarket on the ground floor. Answering a question about its valuation, the reply given was that it was valued variously at €170 and €120 per sqm metre, that the use was still categorised as being offices over shop.

In summary Mr. O’Donoghue stated that Mr. Shaughnessy had provided comparator evidence on 3 supermarkets, and 1 clubhouse/lounge as a basis for comparison with the subject property. Mr. Shaughnessy’s reply was that they were ground floor units of the same size and of the same type. Mr. O’Donoghue asked Mr. Shaughnessy a question regarding change of use for either of the comparator uses to gym use as this is the current use in the subject property. Mr. Shaughnessy’s answer given was a qualified yes, the addendum being that this would also have been the case for the clubhouse to become a gym. Mr. Shaughnessy defended the VO position i.e. that they do not follow the specific use (in planning terms) extant in a property as any use can potentially change over time. Mr. O’Donoghue stated that he fundamentally disagreed with that statement as he said it was fundamentally flawed having regard to Roche’s ‘Approach to Valuations’ as it appeared that Mr. Shaughnessy was attempting to value the subject property at its highest use value. The Chair advised him to leave that point for inclusion in his final submission. Mr. O’Donoghue referred to a previous statement by Mr. Shaughnessy in relation to MCCs that if there were no structural changes there would be no MCC and that more people would be disadvantaged, and it would be inequitable. However, he stated that conversely the Commissioner had stated that the subject property was a Leisure category and that its Use was as a gymnasium/fitness centre, that it was over 1,000 sqms, there are other gymnasiums of over 1,000 sqms are valued at €55 per sqm, and would Mr. Shaughnessy not agree that in this instance it is inequitable to the gym operator to value it as a supermarket, given that it is in use as a gymnasium and with planning permission for that particular use and that this gym operator appears to be treated differently to other gym operators. Mr. Shaughnessy replied that he did not consider the subject property’s operator was being treated differently and that all ratepayers should be treated equally. He stated that his ground floor comparisons show the same rate and that there are two other gyms on the VO’s list operating in ground floor premises, one in the vicinity of the subject premises, that have an NAV of €160 per sqm. Mr. Shaughnessy proceeded with his explanation but did not further identify his two aforementioned

comparisons. He then added that in his evidence he instanced other gyms operating in industrial-style premises with an NAV of €80 per sqm. Mr. Shaughnessy stated that if basement premises were being assessed a value of €55 per sqm might be considered. Answering a further question as to whether he had provided any evidence of ground floor premises of similar size to the subject property in use as gyms, Mr. Shaughnessy replied that he did not look at the specific users. Mr. Shaughnessy asserted that it was Mr. O'Donoghue who had included the VO's schedule of Dublin gyms in his evidence. Responding to this Mr. O'Donoghue asked Mr. Shaughnessy if he was aware why he (i.e. Mr. O'Donoghue) had included that schedule in his evidence to which Mr. Shaughnessy said that he presumed Mr. O'Donoghue had done so to show the full list of gym properties in Dublin. Mr. O'Donoghue explained that another reason was also to show that the subject property at the time the list was downloaded, which the only gym property valued at over €100,000, (never mind €180,000) in the city of Dublin, and despite the fact that the subject property was one third smaller than some of the comparisons and did this not 'ring alarm bells' with Mr. Shaughnessy that something was out of kilter. Mr. Shaughnessy's answer was no insofar as there were many other comparator properties operating, albeit not classified as gyms, of a higher value. He pointed to some gyms being located underneath offices, and that they are valued at up to €260 per sqm. but that many of these are not classified as gyms, rather they are classified as offices. He stated that it was the use of the building that the VO goes by not the individual occupier within it. He stated that by reference to the VO's list that the value depended on a number of factors, not solely on the use what the occupier has or what the planning is. Mr. O'Donoghue stated that he fundamentally disagreed with the last statement and that his approach to rateable valuation had been tried and tested over and over again and he referred to Mr. Shaughnessy's inclusion of two cases cited in his evidence, Browne and Walley; at this point the Chair asked the Mr O'Donoghue to frame his points as questions. Mr. O'Donoghue posed the question to Mr Shaughnessy that the Walley case deals with the specific issue being debated. The point was that had been valued as a shop in parade of shops yet was in use as an office, and the Tribunal found that it was an office and valued it as such. Mr. Shaughnessy responded saying that the Walley case did not represent a winning case for the Commissioner but did show the logic of the thought process of the Tribunal which noted that the Commissioner confined their observations to the future potential use, rather than the use that had preceded the present use. He stated that like the Walley case shows it is possible that the subject property has operated as a retail shop in the past and can do so in the future subject to obtaining the necessary planning permission. He reiterated that he included the Walley case in his evidence, not because it was not won by the

Commissioner, but that it showed the logic adopted by the Tribunal. Answering a question about the Browne case and the VO valuer's comments relating to it, Mr. Shaughnessy stated that he believed the Tribunal's approach was correct insofar as he knew it, but that he did not know the subject property in that case nor the full facts surrounding it. Mr. Shaughnessy stated that he had valued the subject property as a basic box, on the assumption it is available and ready to let. In that context he stated that he had valued it having regard to its location, what it was and what changes had been made to it, to make change it from its former use to its current use and having regard to what it could be potentially used for in the future. In contrast Mr. Shaughnessy said he believed that Mr. O'Donoghue had been unduly focused on the use of the premises as a gym whereas he stated that he had considered the floor level, the energy rating and such factors.

Mr. O'Donoghue referred to Mr. Shaughnessy's inclusion of the Browne case in his evidence and asked him to agree that he agreed with it and that he was not trying to contradict its findings or conclusions. Mr. Shaughnessy agreed with Mr. O'Donoghue's question to him but added that that case and the Walley case had been included to show the logic applied by the Tribunal in those cases, not necessarily the outcome. Mr. O'Donoghue noted that in neither case had it been established by the Tribunal whether or not planning for change of use had been required, but he asked Mr. Shaughnessy to confirm that in the subject case, planning permission had been required. Mr. Shaughnessy confirmed that planning permission had been obtained from Dublin City Council for the change of use. Mr. O'Donoghue then referred back to the Browne case where it had been noted in the judgement at 10.3 that the property had full planning for a gym and that neither party could confirm whether Planning Permission was required to convert to a shop or office and was therefore valued as a gym. and he opined that that decision might be relevant to the subject case. Mr. Shaughnessy replied that while he was not cognisant of all the facts in that case and was relying on the written Tribunal decision, that the relevance was that in that case also, the Use at the valuation date was relevant. Mr. O'Donoghue asked, how in simple terms, the fact that the Tribunal in that case had stated that the property was in use as a gym and therefore should be valued on that basis supported the assertions around use that Mr. Shaughnessy was making. Mr. O'Donoghue reframed his question asking Mr. Shaughnessy to agree that in the subject case, at the effective date, that the property was in use as a gym. Mr. Shaughnessy answered confirming that this was correct as was Mr. O'Donoghue's follow-up question seeking confirmation that planning permission would be required to convert it to retail or office use. However, Mr. Shaughnessy also pointed out that

at the valuation date, the property was in use as retail. Mr. O'Donoghue then asked how that earlier date of valuation, ten years prior to the effective date was relevant. Mr. Shaughnessy asserted it was relevant in the context of the Walley case and similarly also in the Harper Stores High Court decision. (i.e. what it was then, what it is now, and what potentially it might be in the future.) He further claimed that those cases were included in his evidence so support his argument, whereas he stated that Mr. O'Donoghue had not included Tribunal or court precedents to support his argument. Mr. Shaughnessy stated to the Chairman that that concluded his questions to Mr. O'Donoghue.

The Chair asked whether the other Tribunal members had any further questions. Mr. Morgan addressed a question to both parties, referencing one of the comparisons, Donnybrook House, as an example, and in relation to the floor levels in use as a gym, that the NAV rate for the three levels, Ground floor, minus one and minus two would stay the same regardless of the level, whereas in office use, one looked at first floor or basement levels, there could be a material value difference in that use and there did not appear to be a consistent value across all floors when one was looking at retail use. Mr. O'Donoghue's reply was to point, as an example, to Georgian properties where he stated that values varied between floors with basement being valued at less than ground floor, with reductions at upper levels. He stated that this was a factor based on no lifts in Georgian buildings, but that in modern third generation buildings, where there were lifts that the values were usually a flat value across all floors. Mr. Shaughnessy said he could see a logic for a differential value in some cases for upper floor reductions, instancing the South Richmond and Jervis Street gym comparisons, but he could not account for the upper floors in the Camden Street gym comparison being valued at the same rate across all floors. In the case of the Donnybrook gym comparator property, he said if it had been his case, he would have given the lower basement level lower rate.

The Tribunal then posed questions to Mr. Shaughnessy firstly asking about the qualification of buildings for LEED standards and whether or not part of this required the existence of a gym within the building or the development. Mr. Shaughnessy's reply was that the presence of a gym within the building was not a prerequisite to achieving LEED status, but there would need to be access to one in close proximity along with other 'sustainability' features such as access to public transport, Dublin bikes, availability of health foods in the convenience store etc.

The Chair asked about the nature of the ground floor use in the Jervis Street Twilfit building to be told its present use was as a museum but that it was classified as a shop or retail shop.

The Tribunal then referred to para 55 of the Dayhoff decision, wherein it referred to the relevance of the pre and post MCC user type and their uses being similar to the post MCC use of the combined properties, whereas in the subject case the uses pre and post MCC are different the former being retail, and the latter being a gym. He asked if Mr. Shaughnessy would agree with that the importance of that distinction to which Mr. Shaughnessy's reply was yes.

The Tribunal then referred to the planning permission for the subject property, noting that the planning covered the entire development rather than just the subject property (as a gym) and asked Mr. Shaughnessy if he agreed this was the position. Mr. Shaughnessy replied in the affirmative.

Turning to Mr. Shaughnessy's evidence relating to potential uses, and related planning requirements the Tribunal asked Mr. Shaughnessy to confirm that the Commissioner of Valuation was separate from the planning process and was bound, like anybody else, to whatever planning requirements might be required and necessary, to which again the response was yes.

The Chair then asked Mr. Shaughnessy to confirm, by reference to commentary in his precis on the planning status of the subject property, that at the date of valuation it was the previous occupier rather than the current occupier of the property that had planning permission for retail use. Mr. Shaughnessy affirmed this was the position.

The Chair then asked the parties to sum up.

Mr. O'Donoghue summarised the Appellant's position as follows:

1. A request to the Tribunal that the four comparables put forward by Mr. Shaughnessy be disregarded by virtue of the fact that three were retail (i.e. not leisure/gym), none of the properties was in leisure/gym use and that none of them was on the Valuation List of gym properties.
2. He stated that in his evidence he had submitted 4 gym comparables, 3 of which were premises of over 1,000 sqms, all of them ranged across more than one floor. Despite

this he noted that the Commissioner of Valuation has applied a standard valuation rate of €55 per sqm to all these properties regardless of the floor level. He stated that in accordance with long established valuation practice, they had all being valued in their existing state – *rebus sic stantibus* – and that any change from this use would require planning permission, which might not be forthcoming and was therefore a risk.

3. That it was wrong to value it by comparing it to a supermarket use, i.e. its former use, and that in summary he asked that the Tribunal would find for a valuation of €66,000.

Mr. Shaughnessy was asked to summarise his case. He stated that that:

1. The property had been in use as a supermarket. Changing to ‘gym use’ had only necessitated minor alterations, that these had been deemed to constitute a Material Change in Circumstances, that all his comparisons were ground floor units, and like the subject property prior to revision all had an NAV of €155per sqm. He asked that Mr. O’Donoghue’s evidence be disregarded.
2. He stated that 1st and 2nd floors are valued at a lower rate than ground floor space irrespective of the use, as are basements.
3. That the ground floor space in the subject unit is being charged at the appropriate rate for its size, irrespective of use.
4. That this is a *rebus sic stantibus*/quantum case and that while there are a number of RSS cases, there are also a number of ‘use’ cases for reference.
5. He stated that he had used three cases to support his argument to the Tribunal for a holistic approach, in the context of what the property was, what it currently is, and potentially what change of use might be possible in the future.
6. Referring to previous case precedents, he conceded that the Valuation Office position was rejected by the Tribunal but that he believes on this occasion the approach which has been taken is correct, and that Mr. O’Donoghue has conceded that the user could be changed, subject to planning permission.
7. He asserted that if a future retail user were to move into the subject property at Mr. O’Donoghue’s rate of €55per sqm metre, this would conflict with the previous retail use for which a rate of €155per sqm was being paid by the occupier and is being paid in the occupiers new nearby premises, and that this situation would persist until the next revaluation in Dublin.

In his summing up Mr. Shaughnessy said his objective was to look at what the premises are, what it had been and what it could be in the future. He said that planning could change, the landlord's requirements could change with a relocation of the gym, and that there are other retail units, apart from his comparison 2, that are paying a higher NAV rate than the €155 per sqm up to €400/500 per sqm for Zone A and as such it would be very inequitable to reduce the subject units NAV to €55 per sqm for this prime, top quality, 'A' rated, LEED Gold building just because of the type of current occupier as a gym.

The Chair asked Mr. Shaughnessy two supplementary questions- the first being in relation to the Harrington Street, former Garda Club property. Noting this this was valued in the last revaluation, the question asked was what was the valuation date? The answer given was that the effective date was 1.1.2014, further noting the valuation date to be April 2011. When asked who was listed as the user on the valuation list, Mr. Shaughnessy confirmed that on the current VO system, this gave the occupier's name as being the Garda Metropolitan Recreation Centre. The Chair asked if the next revaluation Date will be 5-10 years from 2014 to which the answer was yes.

9. SUBMISSIONS

9.1 There were no legal submissions.

10. FINDINGS AND CONCLUSIONS

10.1 On this appeal the Tribunal has to determine the value of the Property so as to achieve, insofar as is reasonably practical, a valuation that is correct and equitable so that the valuation of the Property as determined by the Tribunal is relative to the value of other comparable properties on the valuation list in the rating authority area of Dublin City Council.

In arriving at this determination, the Tribunal has taken into account the following:

10.2 The Tribunal notes evidence given that the Windmill Lane mixed development was acquired some years ago by Hibernia REIT and that planning permission was granted for the overall redevelopment including the change of use of part of the ground floor and basement from retail to gymnasium and this also involved some physical changes to the previously rated retail unit.

The overall property was substantially redeveloped and extended. This included the relocation of the Eurospar from the subject property to an adjacent corner location in the same development, with the current gym occupiers of the subject property taking a 10-lease of the subject property in late 2018.

10.3 That Mr. O'Donoghue has advanced evidence relating to premises used as gym businesses in support of his case for a reduction in NAV to €55 per sqm in line with other gym properties on DCC's valuation list.

10.4 That Mr. Shaughnessy believes that the previous NAV rate of €155 per sqm as a retail unit is appropriate and that the property has to be assessed holistically rather than the user being confined to gym use.

10.5 The Tribunal has taken into account of all the constituent factors which together contribute to value, notably location, building type, building quality, and user.

10.6 The Tribunal notes all of the comparative evidence put before it by the parties, and determines that overall, it is more persuaded by the reasoning presented by Mr. O'Donoghue in his evidence.

10.7 In terms of Mr. Shaughnessy's evidence, the Tribunal considers that the Baggot Street Tesco property is not a good comparison and notes that the Harrington Street Flyfit property is still categorised by the VO as being as a Leisure use.

10.8 The Tribunal notes on the basis of the arguments adduced that for retail users, a ground floor presence is essential, and that given this importance, that type of user is prepared to pay rental values which reflect this

10.9 The Tribunal notes that on the evidence presented by the parties, that this does not demonstrate that a similar ground floor presence for gymnasia is necessarily a prerequisite, and that the evidence confirms that many gyms operate satisfactorily in premises where the main gym space is sometimes below ground level, and in other gym properties above ground level.

10.10 The property must be valued as vacant and to let and on that basis its planning status is relevant. It has planning permission for use as a gym as part of an overall development and does not have planning permission for retail use. It must be valued “Rebus sic Stantibus” and it is not for the Tribunal to speculate what its future use might be. Nor would this be fair and equitable to the current occupier.

10.11 Mr. O’Donoghue argued that the property must be valued “as is” that is as a gymnasium on the basis of rebus sic stantibus and noted that the property had been part of an overall scheme of redevelopment involving planning permission including for a gymnasium in this space and which involved the moving of the previous retail occupier of this space to an adjacent location. There were physical changes to the property although it was accepted that to reverse the change would involve relatively little physical alteration but would be subject to planning permission. Mr. Shaughnessy argued that the property could readily revert to retail and therefore should be valued as a retail unit and as there was a previous valuation on the list effectively for this property in retail use that that valuation or rate of NAV should be used. In support of this Mr. Shaughnessy noted the Dayhoff case which ruled that in that case the Tribunal had been wrong in excluding from consideration as comparisons the pre MCC values of the two properties that had been combined in to one giving rise to the MCC and resultant revision. However, it must be noted that Mr. Justice Barr in this judgement while ruling that the Tribunal should have considered the pre MCC valuations also said that it was a matter for the Tribunal what weight if any it attached to them. Mr. Justice Barr quoted from a Tribunal Judgement VA05/3/054 “...all evidence of value is relevant but most weight must be given to that comparison or comparisons which most closely resemble the property to be valued in terms of location, nature of construction, design, configuration and use”. He then said that the Tribunal was correct in stating that it should not shut its eyes to relevant evidence being the Pre MCC values of the property albeit that the evidence will vary depending on what existed pre MCC and what is the nature of the property post MCC. He noted that the court is satisfied that the pre MCC valuations that had been excluded by the Tribunal in the Dayhoff case were relevant because given the nature of the use of the premises and the business carried on in the pre MCC properties and in the post MCC properties they were certainly comparable to the subject property.

Mr. Justice Barr in Dayhoff did not state that the Tribunal was bound by the pre MCC valuations but that they were relevant comparisons to which the Tribunal could give what weight it judged.

The current use in the premises under appeal is quite different from the pre MCC use and thus this Tribunal gives little weight to that comparable evidence.

Mr. Shaughnessy also argued that it would be unfair to other rate payers if in the future the subject property was changed to retail and there was not such a valuation on the property. In the opinion of the Tribunal, it is not appropriate to try to second guess what a future use might be as this would be equally unfair to the current occupier. The rating hypothesis is that the property is vacant and to let and it must be noted that it has planning permission for gymnasium use and not a retail use. It should be noted that the legislation provides for revaluations at 5 to 10 year intervals and this can take care of the situation should there be a change in the use in the future not covered by the MCC provisions.

The Tribunal in VA 14/5/087 (Walley) valued the property as offices even though it had originally been retail and subsequently derelict. In VA14/5/370, (PF O'Reilly), the Tribunal valued former shop premises which were in use as offices with planning permission as offices. In VA 17/5/617 (Alan Browne) the Tribunal valued based on the existing use as a gymnasium and not in the alternative use as offices proposed by Mr. Shaughnessy.

DETERMINATION:

The Tribunal, in reaching its determination has carefully considered the evidence given by the parties in terms of the location of the subject property, the 'tone of the list' for gym premises, the date of valuation, the disposition of the subject property within the building, that the property is a modern flexible purpose-built commercial premises and taking note of the character of the surrounding hinterland from a commercial perspective. Taking account of the foregoing it allows the appeal and decreases the valuation of the Property as stated in the valuation certificate to €88,600 comprised as follows:

Gymnasium	GF	1,130.90sqms @ €75per sqm = €84,817.50
Stores	-1	125.90 sqms @ €30 per sqm = €3,777.00
<u>TOTAL</u>		<u>€88,594.50</u>
Say		€88,600.00

And the Tribunal so determines.

RIGHT OF APPEAL

In accordance with section 39 of the Valuation Act 2001 any party who is dissatisfied with the Tribunal's determination as being erroneous in point of law may declare such dissatisfaction and require the Tribunal to state and sign a case for the opinion of the High Court

This right of appeal may be exercised only if a party makes a declaration of dissatisfaction in writing to the Tribunal so that it is received within 21 days from the date of the Tribunal's Determination and having declared dissatisfaction, by notice in writing addressed to the Chairperson of the Tribunal within 28 days from the date of the said Determination, requires the Tribunal to state and sign a case for the opinion of the High Court thereon within 3 months from the date of receipt of such notice.