Appeal No: VA17/5/631

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

NA hACHTANNA LUACHÁLA, 2001 - 2015
VALUATION ACTS, 2001 - 2015

JOHN DALTON & SONS LTD **APPELLANT**

and

COMMISSIONER OF VALUATION **RESPONDENT**

In relation to the valuation of
Property No. 5008910, Industrial Uses at Unit 9 Block G Athy Business Campus, Athy, County Kildare.

B E F O R E

Majella Twomey - BL	**Deputy Chairperson**
Frank O'Grady – MA, FSCSI, FRICS, FIABCI	**Member**
Annamaria Gallivan – MRICS, MSCSI, BSc Hons, TRC	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 4TH DAY OF NOVEMBER, 2020.

1. THE APPEAL

1.1 By Notice of Appeal received on the 12th day of October, 2017 the Appellant 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 €5,810.

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 19 (5) of the Act because : *"The subject property is in an incomplete not-watertight shell state. It has no power and no water connected. It is incomplete and should not have been included in the valuation list as it was still in progress and not fit for occupation."*

1.3 The Appellant considers that the valuation of the Property ought to have been determined in the sum of €0.

2. REVALUATION HISTORY

2.1 On the 10th day of March, 2017 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 the Appellant indicating a valuation of €5,810.

2.2 A Final Valuation Certificate issued on the 7th day of September, 2017 stating a valuation of €5,810.

2.3 The date by reference to which the value of the property, the subject of this appeal, was determined is the 30th day of October, 2015.

3. THE HEARING

3.1 The Appeal proceeded by way of an oral hearing held in the offices of the Valuation Tribunal at Holbrook House, Holles Street, Dublin 2, on the 29th day of January, 2020. At the hearing the Appellant was represented by Mr. Eamonn Halpin B.Sc. (Surveying), MRICS, MSCSI of Eamonn Halpin & Co. Ltd and the Respondent was represented by Mr. Robert O'Neill BL instructed by the Chief State Solicitors Office and Mr. Sean Donnellan MSCSI, MRICS, B.Sc. Hons in Property Valuation and Management 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.

4.2 The subject property is one unit in a block of industrial units, known locally as 9-14, Athy Business Campus, Athy, Co. Kildare.

4.3 The subject property is located in Athy business campus, Athy Town, County Kildare. It is situated off Upper William Street to the west of Athy.

4.4 The business campus allows for easy access to the major transport links of the M7, M8 and M9 motorways.

4.5 The units were constructed in 2008, but this unit has never been occupied. This unit along with the other units under appeal were purchased by the Appellant in 2015.

4.6 The subject property is part of a terraced industrial unit of a two- storey industrial block. The block has car parking.

4.7 The property is a steel frame construction with metal deck roofing.

4.8 The floor areas are agreed and the subject property is held freehold.

4.9 The subject property is not being used for any specific purpose at present.

5. ISSUES

5.1 There is only one ground of appeal in this case and that is whether the subject property is capable of beneficial occupation and is, therefore, rateable.

6. RELEVANT STATUTORY PROVISIONS:

6.1 Schedule 3 of The Act states in Paragraph 1 that.—Property (of whatever estate or tenure) which falls within any of the following categories and complies with the condition referred to in *paragraph 2* of this Schedule shall be relevant property for the purposes of this Act:

a) buildings,

(*b*) lands used or developed for any purpose (irrespective of whether such lands are surfaced) and any constructions affixed thereto which pertain to that use or development,

(*c*) railways and tramways, including running line property and non-running line property,

(*d*) harbours, piers, docks and fixed moorings,

(*e*) mines, quarries, pits and wells,

(*f*) rights of fishery,

(*g*) profits *á prendre*, other than rights of fishery,

(*h*) tolls,

(*i*) easements and other rights over land,

(*j*) rights to drill for and take away petroleum,

(*k*) canals, navigations and rights of navigation,

(*l*) advertising stations and land and any buildings used as advertising stations,

(*m*) electricity generating stations, including where appropriate—

(i) all buildings and structures,

(ii) all tanks, including fuel oil tanks, water tanks and chemical tanks,

(iii) boilers, furnaces and ancillary fuel handling equipment,

(iv) cooling water inlet and outlet facilities, including pump-houses, culverts, pipe-works, weirs and outfall works,

(v) natural gas installations,

(vi) effluent disposal works, including chimneys and treatment plant,

(vii) wind generators, turbines and generators, together with ancillary plant and electrical equipment, including transformers,

(viii) docks, cooling towers, embankments, canals (head race, tail race), locks, penstocks and surge tanks,

(ix) dams, weirs, bridges, jetties, railways, roads and reservoirs,

(x) all ancillary on site developments,

(xi) all electric lines.

(*n*) the entire networks subsumed in an undertaking including, as the case may be—

(i) signal transmission and reception equipment, all associated masts, lines, cables, posts, pylons, supports, brackets, ducting, tubing and all equipment necessary for normal effective functioning of the networks up to the supply point for each individual consumer,

(ii) all pipeline networks and systems, including pressurising and pressure reducing equipment, together with associated site developments,

(iii) storage and containment facilities, including tanks, silos or other plant or developments used for the storage and for containment of any substance whether solid or fluid (liquid or gaseous),

(iv) gas works, gas pipelines and natural gas terminals,

(v) telecommunications, radio and television relay and rediffusion networks, including lines, cables and ancillary appendages necessary for the working of such networks,

(vi) electricity transformer stations, including—

(I) all buildings and structures,

(II) all site developments,

(III) transformers,

(IV) electrical equipment, including switchgear, circuit breakers and associated developments,

(V) all electric lines,

(vii) electric lines (within the meaning of the **Electricity (Supply) Act, 1927**, as amended by **section 46 of the Electricity (Supply) (Amendment) Act, 1945**), including transmission and distribution networks and consumer service mains and networks on, over, or under ground, together with lines and cables with their respective supports (including poles, pylons and brackets), culverts, cuttings, ductings and pole transformers, used in association with those electricity conductors,

6.2 Paragraph 2 of Schedule 3 states that—The condition mentioned in *paragraph 1* of this Schedule is that the property concerned—

(*a*) is occupied and the nature of that occupation is such as to constitute rateable occupation of the property, that is to say, occupation of the nature which, under the enactments in force immediately before the commencement of this Act (whether repealed enactments or not), was a prerequisite for the making of a rate in respect of occupied property, or

(*b*) is unoccupied but capable of being the subject of rateable occupation by the owner of the property.

7. APPELLANT'S CASE

7.1 Mr David Halpin appeared for the Appellant and he said that the subject property was part of an incomplete industrial unit. He said that the industrial unit was partially constructed in 2008, but was never finished following the collapse of the property market. He said that the unit had never been occupied. It was stated that the Appellant purchased the property in 2015, along with the adjacent site. He said that the interest was in the land as it was a zoned site. The Appellant said that the units have not been touched since they were purchased.

7.2 At the outset of the hearing, the Appellant introduced a letter from Ormonde Construction, dated the 17th January 2020. The Respondent objected to same as it had arrived so late in the date and it refers to the condition of the property in January 2020, and not on the Valuation date. The Tribunal had to read the letter to assess its evidential value and finds that it is not of assistance to the Tribunal as it refers to the condition of the property in January 2020, and not the condition of the property at the date of valuation.

7.3 Evidence was given by Mr Halpin, for the Appellant, that the subject property is not watertight and that this has resulted in water ingress. It was stated that the property is not serviced and that it has no electricity, water or sewage. Mr Halpin also stated that the service road and pathways were never put in.

7.4 It was the Appellant's case that the subject property remained a building site and there is no certificate of completeness for the units. Mr Halpin was of the view that an architect would not sign of on the units as being complete. Mr Halpin also stated that the property could not be insured.

7.5 The evidence was that as the subject property is not being put to any actual use that the subject property automatically fails the test of beneficial ownership.

7.6 Mr Halpin said that there are seven units in the block and that only one unit is beneficially occupied. It was stated that the subject property is shell and core and the unit is as the builder left it. Mr Halpin was of the view that an auctioneer could not let the property in its present state.

7.7 Mr Halpin, on cross examination by Mr O Neill BL, agreed that there were windows, doors and a roof on the property but he said that the roof is incomplete. He said that a roofing contractor would have to fix the flashing. It was put to Mr Halpin the valuer from the Valuation Office, Mr Donnellan, did not outline this fact in his precis of evidence. Mr Halpin replied that when he went to see the property that the roof panels were not sealed. He said, however, that he had not been on the roof, but it was clear to him that there had been no snagging.

7.8 Mr O Neill BL put it to Mr Halpin that there was no clear evidence that the roof was not complete and Mr Halpin said that there was some water ingress. Mr O Neill BL suggested that the property was complete as it had a roof, windows and an exterior. Mr Halpin said that it was in shell and core condition and that the windows were not sealed or finished.

7.9 Mr O Neill BL asked Mr Halpin if there was hardcore on the yard outside and Mr Halpin confirmed that there was.

7.10 It was put to Mr Halpin that the building is fitted for electricity and Mr Halpin said he could not say. He said that even if it was the electricity would have to be connected. Mr O Neill BL pointed out an electrical box in a photograph which was put to Mr Halpin. Mr Halpin replied that ‘it is just a box’. Mr O Neill BL showed Mr Halpin a photograph at page 28 of the Respondent’s precis and suggested that it was an electrical box, to which Mr. Halpin said ‘it could be for a telephone’. Mr O Neill BL went onto show Mr Halpin photographs on page 29 of the Respondent’s precis showing electrical fitting and cables on the property and Mr Halpin replied that the fittings and cables do not mean the electricity is connected.

7.11 Mr O Neill BL suggested that the building was plumbed, and Mr Halpin said that there was no plumbing. He agreed that there was pipe work laid and the floor is poured but he said that he doubted if the plumbing would function.

7.12 Mr O Neill BL suggested that the building could be used for storage. Mr Halpin rejected this idea saying that the building does not have a certificate of practical completion. Mr Halpin suggested that the site was dangerous. He said that he saw two manholes there. Mr O Neill BL asked Mr Halpin why a Tenant would require a certificate of practical completion and Mr Halpin said that a Solicitor would look for one. He said that a solicitor would also require a fire certificate. Mr O Neill BL asked if the other half of the block had a fire certificate and Mr Halpin said he had not checked. It was put to Mr Halpin that the property had been sold with a Ber certificate. Mr Halpin did not respond. Mr O Neill BL suggested that the property was purchased without a fire safety certificate and therefore, this would not prevent a lease being granted. Mr Halpin said that a hypothetical tenant would not take it.

7.13 It was put to Mr Halpin that a tenant could fit it out himself and he said that a possible deal could be done. Mr O Neill BL suggested that sometimes tenants spend a lot of money completing a building. Mr Halpin accepted this point, but he said that the valuation office is projecting forward by proposing that.

#8. RESPONDENT’S CASE

8.1 Mr Donnellan gave evidence on behalf of the Respondent. He said that he inspected the subject in 2016, and again on the 8th of January 2020. He said that the subject property is fit for industrial use.

8.2 The evidence was that the subject property has plumbing but no sanitary ware has been fitted. Mr Donnellan said that the units are wired for electricity but no light fittings or power sockets have been installed.

8.3 Evidence was given that unit 8, another unit in the business campus, was let in January 2016 in the same condition as the subject property. It is used by a mechanic. There was a loose letting arrangement from January 2016 and the property is currently used as a workshop. The Tenant installed a car lift and stores tyres in the mezzanine. There is no toilet in that unit. There is no handrail in the mezzanine. Mr Donnellan provided clear up-to-date photographs of this unit with the car-lifts and the storage area.

8.4 Evidence was given that the units are surrounded by a hardcore yard. Mr Donnellan said that the subject property could be let like unit 8 but no efforts have been made to do so. He said that there is an electrical box fitted outside the building and that there is wiring and piping for plumbing. He said that the footpath is complete. The evidence was that, in 2016, there was no evidence of water ingress or any water at all. Mr Donnellan said that he visited in autumn time in 2016.

8.5 Mr Donnellan showed the Tribunal the photograph, at page 28 of his precis of evidence, of an ESB box. He said this was the power supply for the building. He said that two similar boxes ran along the row of units. Mr Donnellan said that there was wiring in the subject unit and that a tenant could have it fitted out. He said that it was not unusual to have a hardcore finish on such sites.

8.6 Mr Donnellan described the subject property as a shell property and he said it was ready to be let. He described it as an industrial warehouse with storage. He said that it was fully enclosed and watertight with roller shutters. He confirmed that unit 8 is let in a similar condition.

8.7 When asked if one needed a certificate of practical completion to let a property Mr Donnellan said he was not aware of this. He was asked if a property could be rated without a fire safety certificate or a certificate of completion and he said that it could. Mr Donnellan confirmed that the property was ready to let as industrial storage.

8.8 In cross-examination it was put to Mr Donnellan that anything could be rated but it does not mean it is legal. Mr Donnellan did not agree with this and said that there are certain standards which are followed. He said that for a property not be rated one would almost have to be able to look up at the roof and see the sky. He said that the present situation was not like a new house which is not completed. He said that this situation was different as it was a maintenance issue.

8.9 Mr Halpin questioned Mr Donellan on his proposed use of storage for the unit. Mr Donnellan said that occupiers could fit the subject property out to fit the use. He said that the fact that there are no toilets was not relevant.

8.10 Mr Donnellan said that the property was unoccupied but capable of rateable occupation. In relation to the ESB connection Mr Donnellan said that when a receiver takes over, they usually disconnect the ESB. However, he said that the ESB were there at some point.

8.11 Mr Halpin put it to Mr Donnellan that the subject property was unsafe and he replied that it was not unsafe. He said that unit 8 is in the same condition.

9. SUBMISSIONS

9.1 The Appellant submitted that to be on the rating list a property must be a 'relevant property' capable of beneficial occupation, as set out in schedule 3 of the Act. It was submitted that the act refers to a 'building' which means that the building must be complete.

9.2 The Appellant said that the property is not a relevant property and it is not a completed building.

9.3 The Appellant stated that the property must be valued Rebus Sic Stantibus. The recent case of ***Clement Kelly VA14/05/089*** was cited, where the Tribunal referred to the High Court case of ***Harper Stores LTD v The Commissioner of Valuation [1968] 1 IR 166***. It was submitted that the subject property's incomplete state means it cannot be rebus sic stantibus in that it is in a partially constructed state for over a decade and has never been occupied. Furthermore, it was submitted that the subject property is not being put to any actual use.

9.4 The Appellant also cited the case of ***Marconi Communication Optical Networks LTD , VA01/3/040***, whereby the valuation was struck out for being incapable of beneficial occupation as the building was incomplete at the time of revision.

9.5 The Respondent submitted written and oral submission. He said that there is a recent case on this point before the High Court called ***Fibonacci Property ICAV V Commissioner of Valuation [2020] IEHC 31,*** but urged the Tribunal that the facts of that case were significantly different to the case before it.

9.6 It was submitted that the law on Rebus Sic Stantibus is well clarified. The Respondent cited ***London County Council v Erith Churchwardens [1893] AC 562***, the test was whether the land was '*struck with sterility in any and everybody's hands'*. Mr O' Neill BL cited Hershel J in that case, who stated that '*for a property to escape rating, it's occupation must have no value at all to anyone. This is a very high bar for an occupier to overcome'.*

9.7 The case of ***R v School Board for London (1886) 17 QBD 738*** was also cited by the Respondent. This case state that for something to be struck with sterility that *'there must be no potential for occupation whatsoever'.* Mr O' Neill submitted that it is surely not arguable that a property which cost several hundreds of thousands of euro has no value or benefit to the occupier.

9.8 Mr O' Neill BL referred to the case of ***Glenveagh Hotel v The Commissioner , VA02/4/005*** where the Tribunal found that the only works needed to make the property suitable for occupation as a hotel were in the nature of fit-out in the kitchen, bar and other public areas and that '*a hypothetical tenant as envisage under the valuation code would take all of the above factors into account in formulating an opinion of rental value at the relevant date'.*

9.10 The Respondent also referred to a case called ***Fabian Doyle v Commissioner for Rateable Valuation VA14/2/001,*** whereby it was found that an absence of planning permission and a refusal of retention were not a basis for a property to be incapable of beneficial ownership.

9.11 Mr O' Neill BL cited ***Harper Stores LTD v The Commissioner of Valuation [1968] 1 IR 166***, stating that regard must be had not only to the current state of the property but also to its potential.

9.12 The Respondent submitted that the Appellant has done no more than to show that the subject property is a shell. Mr O' Neill BL cited ***Descon v The Commissioner VA05/3/074*** in this respect. In that case a rear section of a property supposedly not suitable for occupation, being an unfinished shell without electricity or heating was nonetheless capable of beneficial occupation.

9.13 It was stated that there is no evidence that there was a leak, on inspection, in 2016. It was submitted that services are in place for immediate connection. It was submitted that the property is perfectly usable for stores, a mechanics shop for example, like unit 8.

9.14 It was submitted that any deterioration or lack of maintenance is a matter for the owner and does not affect the rateability of the property.

10. FINDINGS AND CONCLUSIONS

10.1 On this appeal the Tribunal must determine whether the subject property is capable of beneficial occupation. Having weighed and evaluated all the evidence and law before us, the Tribunal makes the following findings.

10.2 The evidence before the Tribunal suggests that subject property is an industrial building which has never been occupied. Mr Halpin made a number of assertions in relation to the fact that he was of the view that the property was not watertight and not connected to electricity, plumbing and sewage. However, on cross examination, when it was put to him that there were electrical fittings, he then said that he could not say. When it was put to Mr Halpin that there was plumbing, he said that he doubted that the pipes would function. The Tribunal finds that Mr Halpin did not call evidence as to what the actual state of the property was at the date of valuation. Mr Donnellan, on the other hand, inspected the property in 2016, and gave clear evidence that there was no water ingress at that time. Mr Donnellan said that there was wiring and piping for plumbing along with a complete footpath. He produced photographs of the property which clearly show that it has roller doors, windows, electrical boxes on the outside and electrical cables on the inside. Mr Donnellan described the building as a shell building which is perfectly cable of beneficial occupation.

10.3 In circumstances where Mr Donnellan has had the benefit of attending at the subject property in 2016, and inspecting it at a time which was close to the valuation date, the Tribunal accepts his evidence regarding the nature of the subject property at that time. The Tribunal finds that while the property may have deteriorated since valuation that the Appellant did not provide clear evidence to suggest that the property did not have electricity or plumbing at the date of valuation. The Tribunal finds that the onus of proof is on the Appellant in respect of this and he failed to provide this evidence. While he produced a letter dated the 17th of January 2020, from a construction company stating that there was no electricity connection and there was a leak in the roof, this letter is a reflection of the state of the property in 2020, and not at the date of valuation .

10.4 The Respondent produced clear and compelling evidence to show the Tribunal that another unit in the same block, which is in a similar condition to the subject property and has been let to a mechanic and is used as a storage area for tyres as well as a garage to repair cars. Mr Donnellan gave clear evidence that this neighbouring unit, Unit 8 was also not complete, but that it was being rented by a Tenant. Mr Donnellan said that the subject property cannot be said to be unsafe for the purposes of storage or being used as a garage, as Unit 8 is being used in this way. The Tribunal accepts this evidence and the Appellant has not contradicted the fact that Unit 8 is being let out.

10.5 Mr Halpin argued that the property was incapable of being rated as there was no fire safety certificate or certificate of completion. Mr Halpin said that the subject property was unsafe and he referred to a case called ***Clement Kelly v Commissioner of Valuation VA14/5/089.*** The Tribunal has read the Kelly case and notes that in that particular case, the Tribunal heard from a specialist conservation architect who opined that the property in question required complete renewal due to structural defects whereby the front wall was no longer tied to the rest of the building and there was a danger of the chimney breast collapsing. No expert evidence was given, in the present case, to the effect that the property was unsafe, apart from an unsupported assertion by Mr Halpin that this might be the case. Mr Donnellan gave unambiguous evidence that a property is capable of being rated without a fire safety certificate or a certificate of completion. The Tribunal finds that there is no clear evidence before it to suggest that this property is unsafe and therefore incapable of beneficial occupation for that reason.

10.6 The Tribunal has assessed the case law in this area. While the subject property is in shell condition and could do with improvements and fit out, it is not the case that it is '*struck with sterility in any and everybody's hands'*. The Tribunal refers to the dicta in ***London County Council v Erith Churchwardens [1893] AC 562***, which stated that '*for a property to escape rating, it's occupation must have no value at all to anyone. This is a very high bar for an occupier to overcome'*. It is clear from the evidence before it that the subject property while basic, is not a property which is unusable. The fact that a neighbouring unit in the same block, in a very similar condition, is being let for storage and as a garage, supports this contention.

10.7 Furthermore, it is clear from the evidence before us that a property can be rented to a Tenant without being connected to electricity and plumbing as these are matters which can be rectified by the Landlord or Tenant if they so wish. These matters alone do not make a property incapable of beneficial occupation as was set out in ***Descon v The Commissioner VA05/3/074.***

10.8 Both parties referred to the recent High Court case of ***Fibonacci Property ICAV V Commissioner of Valuation [2020] IEHC 31***. In that case, Judge Hyland found that The Valuation Tribunal had not erred in Law in finding the subject property was not capable of beneficial occupation within the meaning of the Act. The Tribunal has read this case and finds that it can be distinguished from the case before us. The Fibonacci case involved property in Ballsbridge, Dublin 4. In that case detailed evidence was given on behalf of the Appellant, at the Valuation Tribunal, by a civil structural engineer, a mechanical and electrical engineer, a senior planner, a quantity surveyor and a valuation surveyor. Evidence was given that the minimum cost of reconstruction works on the property involved €9,174,000 excluding VAT and the non-construction works to be around €2,280,000 excluding Vat. Clear evidence was given in that case that the property was unlettable and incapable of beneficial occupation. The witness for the Valuation Office accepted that there were certain matters which he had not considered in his initial valuation. The case before the Tribunal is very different to Fibonacci. No expert evidence was put before the Tribunal to suggest that the subject property was incapable of beneficial ownership nor did Mr Donnellan concede that he omitted anything in his initial valuation. Furthermore, and significantly, in the present case, there is a direct comparator within the business campus itself, which is in fact being let. Consequently, the Tribunal finds that the dicta in Fibonacci is not of assistance, given the facts of the case before it.

DETERMINATION:

Accordingly, for the above reasons, the Tribunal disallows the appeal and confirms the decision of the Respondent.

And The Tribunal so determines.