Appeal No. VA14/5/915

AN BINSE LUACHÁLA

VALUATION TRIBUNAL

AN tACHT LUACHÁLA, 2001

VALUATION ACT, 2001

Init Yoga Ireland Ltd **APPELLANT**

and

Commissioner of Valuation **RESPONDENT**

In Relation to the Issue of Quantum of Valuation in Respect of:

Property No. 2211860, Gymnasium/Fitness Centre at 48 Ringsend Road, County Borough of Dublin.

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 8TH DAY OF JANUARY, 2018

BEFORE:

Stephen J. Byrne - BL	**Deputy Chairperson**
Frank O'Donnell - FRICS, B Agr Sc, MIREF	**Member**
Michael Connellan Jr - Solicitor	**Member**

By Notice of Appeal received on the 4th day of September, 2014 the Appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €84,100 on the above described relevant property on the grounds as set out in the Notice of Appeal as follows:

"The subject property's estimate of net annual value is excessive and inequitable. The property's valuation is significantly out of step with the values of other gymnasiums in the city. The Commissioner's proposed valuation places the highest rate per m^2 on the subject property in the whole city for gymnasium accommodation. Given the moderate location of the subject property, the hypothetical tenant would not be interested in the subject property unless offered to let at the same (or possibly lower) rent per m^2 versus the comparisons."

"Though the lease in place in the case of the subject property was open market, however, the tenant did not have advice and was not versed in the market. The appellants do not accept that the rent equates to fair value. There is no doubt in the appellants mind that if the appellants had been shown the comparables at €55-80/m^2 when renting the subject, they would not have paid the actual rent agreed."

The Tribunal, having examined the particulars of the property the subject of this appeal; having confirmed its valuation history; having examined and considered the written evidence and having heard the oral evidence on the 23rd day of November, 2015 adduced before us by Mr Eamonn Halpin of Eamonn Halpin & Co. Ltd on behalf of the Appellant, who contended for a net annual value of €27,500, and Mr Anthony Mulvey of the Valuation Office on behalf of the Respondent to the appeal,

Decision

The subject property is situate at Shelbourne Plaza, Ringsend Road, Dublin 4 and is adjacent to Ringsend Dublin Bus Garage. It is 300 metres from Ringsend Village. It is 500 metres from the Grand Canal Dock. It is a ground floor property comprising 424.64 square metres.

The property is held under two distinct leases. The first (in time) was entered into on 6th December 2010. The second was entered into on 19th October 2012. The Appellant has exclusive possession of the entire of Unit B and part of Unit A, Block A of the subject property.

Under the 2012 Lease, the Appellant has possession of only a small portion of the total area. The balance of this particular unit is partitioned and is vacant to let and is not part of the subject property.

Under the Leases, the Appellant has contractually agreed to pay an annual rent which the Tribunal has been told is in the sum of €96,500. €72,500 is on foot of the lease which commenced on 6th December 2010. The balance of €24,000 is on foot of the lease which commenced on 19th October 2012.

The building in which the property is situate has been referred to in evidence is a modern block. The building was, it seems, intended for use as offices. Planning Permission was, it seems, sought and granted for office use.

In or about 21st September 2010 the Appellant applied for and was granted Planning Permission for a change of use from office use to use as a yoga studio. This is in respect of 382.18 square metres of the subject property. The Grant of Planning Permission is subject to a number of conditions.

The subject property was, it seems, let as a shell. The Appellant, having agreed to take the lease as initially entered into, set about fitting out the property for its intended use as a yoga studio. It is, it seems, accepted that the Appellant spent the not insignificant sum of in or around €300,000 in achieving this fit-out.

In consideration for this, the Appellant was, it seems, given a six month grace period by the lessor. There is evidence to support this 'gesture' in the form of a side letter which has been put in evidence and which is dated 6th December 2010.

The valuation date for the subject property is 7th April 2011.

The 'current' (that is to say as of the valuation date) use of the property is as a yoga studio or indeed as a hot yoga facility. As is clear from the photographs of the interior of the property as put in evidence, the fit-out of the premises is consistent with this particular use. There is a reception area, together with a reasonably spatial rear studio. It is noted that the Grant of Planning Permission recites permission for two hot yoga rooms, male and female changing rooms and accessible WC's, reception, office, stores.

The Commissioner put a value on the property for the purpose of rates at €84,100 (NAV), yielding a level of €190 per square metre.

Mr. Mulvey, the Commissioner's representative as nominated for the purpose of this appeal, takes what appears to be, and on the face of it, a materially different standpoint. Mr. Mulvey is of the opinion that the NAV of €71,322.40 represents a fair and equitable apportionment of rates for the subject property. Of the €71,322.40 (NAV), €70,822.40 is put forward as fair and equitable rates for what is termed the main portion of the property described on this somewhat revised appraisal as an office/studio. This yields a rate per square metre of €160. The balance of €500 is attributable to what is referred to as a car park.

Mr. Halpin, on behalf of the Appellant, is not happy with an NAV of €84,100. Moreover, he is not happy with the 'bone' which has, it seems, been thrown his way by the Respondent acting through Mr. Mulvey.

Mr. Halpin proffers a significantly reduced NAV of €27,500. He suggests that this is fair and equitable. This yields a rate of €62 per square metre.

As ever in appeals that come before the Tribunal, the parties are ideologically and diametrically opposed to each other.

Mr. Halpin has in summary put forward two arguments which he asks the Tribunal to consider when assessing whether or not to favour the Appellant by way of a discount and/or adjustment on the amount of rates as set by the Respondent.

The first thing Mr. Halpin relies on is the Appellant's commercial naivety. The Tribunal has been told (second-hand) that the Appellant Company negotiated the amount of rent payable personally, without the benefit and/or assistance of professional advice and/or expertise. Mr. Halpin tells the Tribunal that the amount which the Appellant agreed to pay by way of rent was, in the circumstances, significantly in excess of 'market value' at the time at which the rents were negotiated. It follows on this reasoning that the rent is paid by an actual (as opposed to a hypothetical) tenant in respect of the subject property, whilst ordinarily a valuable guide and/or measure to the NAV, cannot be relied upon in the instant case and by reason of the commercial naivety of the Appellant.

Secondly, Mr. Halpin argues that regard must be had to the use of the property as of the valuation date.

There is, it seems and from the evidence, no dispute between the parties as to the use to which the Appellant has put the property as of the valuation date. As has been stated, the property has been fitted out for use and has been used as a yoga (hot yoga) studio.

Yoga (hot yoga) studios are not, it seems, deserving of their own distinct identity in the world of rateable valuation and/or occupation.

Mr. Halpin suggests on a 'like with like' basis that the closest comparable properties are properties fitted out as and in use as gymnasia.

Consistent with this, Mr. Halpin has put in evidence properties which he maintains are comparable in that they are:

- Fitted out and used as gymnasia
- Drawn from a number of different localities, not necessarily proximate to the subject

Consideration of the properties as put in evidence by Mr. Halpin yields the following:

Ground floor gymnasia in Dublin's 1, 2 and 5 bear a value of €55 per square metre. The square footage involved ranges from 14.05 square metres through 15.3 square metres and up to 467.26 square metres.

Ground floor gymnasia in Dublin's 4 and 6 bear values of €80 and €75 per square metre.

In addition to this and for the sake of completion, properties used as yoga studios under the brand Bikram yoga vary from €50 per square metre (Dublin 3) to €34 per square metre (Dublin 12).

The Respondent, acting through Mr. Mulvey, urges the Tribunal to have regard to the rent which the Appellant has agreed to pay for the subject property on foot of the leases made and which, on the Respondent's case, were made reasonably close to the valuation date. The Respondent has argued that this evidence presents as the keenest and most reliable indicator of the NAV. (What a hypothetical tenant is likely to pay for the property by way of annual rent and making allowance for matters which the relevant statutory provision stipulates must be taken into account).

As has been stated and as accepted, the annual rent payable on foot of the two leases as entered into is €96,500.

In addition, the Respondent makes the following points:

- Yoga studios do not form a distinct category of property for rating purposes.

- Rather, yoga studios 'draw' their value from the terms of their individual setting.

Thus viewed, a yoga studio in a retail setting can and must be valued as though it were retail by comparison to equivalent retail properties. Further, on this reasoning, a yoga studio in a locale that is in the main industrial and/or warehouse can and must be valued as though it were industrial and/or warehouse and by comparison to equivalent industrial and/or warehouse type properties.

On this particular reasoning, the Respondent argues:

(a) The setting in which the subject falls, is an office setting.

(b) The subject falls to be valued as though it were an office and by comparison with equivalent office-type properties.

In support of this particular line of reasoning the Respondent adduces evidence of value pertaining to offices which the Respondent maintains are comparable to the subject in terms of location and size.

Consideration of this evidence yields the following:

- Ground floor offices at a rate of €130 per square metre (with a range of size in terms of area from 66.04 square metres through 216 square metres) through €150 per square metre (355 square metres) and up to €220 per square metre (2,738.69 square metres).

By, it seems, a process of fusing:

(a) On the one hand the amount of annual rent being paid by the Appellant for the subject property.

(b) On the other hand, the evidence of value extracted from consideration of properties in use as offices within reasonably close proximity to the subject,

the Respondent confidently asserts that an NAV equivalent to €160 per square metre for the subject property is fair and reasonable.

Conclusion

The subject property falls to be assessed under Section 48 of the Valuation Act, 2001. Under section 48(1) of the 2001 Act, value is determined by estimating what is termed the net annual value. Under section 48(3), the net annual value is defined as "*the rent for which the property in its actual state might reasonably be expected to let from year to year and on the assumption that recoverable average annual costs, repairs, insurance and other expenses (if any) would be necessary to maintain the property in that state and all rates and other taxes and charges (if any) payable by or under any enactment in respect of the property are borne by the tenant.*"

It is well established, if not settled, that the Latin maxim "*rebus sic stantibus*" applies. It is well established, if not settled, that the Latin maxim "*rebus sic stantibus*" has two limbs, notably:

(a) Existing use;
(b) Physical state.

It is well established when attempting to determine the estimate of the 'hypothetical bid' one must have regard to "*the physical and/or condition of a property*" (as of the date of valuation) and "*the use to which the building is put*" (as of the date of valuation). Insofar as 'use' is concerned, the Authorities suggest that uses other than the existing use may be taken into account when arriving at the estimate of net annual value.

In *Harper Stores Limited v. Commissioner of Valuation* [1968] IR page 166, Mr. Justice Henchy at page 172 states as follows:

"*the use of the words 'actual state' in reference to the hereditaments does no more than apply to the subject matter of the valuation the principle of rebus sic stantibus. As Lord Parmoor said in Great Western v. Metropolitan Railway Companies v. Kensington Assessment Committee 'the hereditament should be valued as it stands and used and occupied when the assessment is made.' While the tenant and the tenancies are imaginary or hypothetical a hereditament may not be looked upon as anything other than the actuality or reality which it is.*

As Lord Brian L C J said in Armstrong v. Commissioner of Valuation 'the words 'actual state' were introduced to ensure that the hereditament or building were valued such as it was rebus sic stantibus and to prevent speculation as to mere contingencies or speculations as to what the value of a house might be under conditions different from those existing. If it is a house in a slum area it may not be valued as if it were standing in a fashionable road; if it is a shop it may not be valued as a factory; if it is a garage it may not be valued as a cinema. It seems to me that the words 'actual state' connote existing factors that go to make up the premises as they are currently occupied and used for all that would affect the rent that would be paid by a hypothetical tenant. Lord Ashbourne C in Armstrong Case 2 at page 501."

Mr. Justice Henchy goes on to state as follows: (Again at page 172)

"*This includes all the advantages and disadvantages legal and otherwise attaching to the premises which would affect the mind of the hypothetical tenant from year to year when deciding what rent he would pay*."

Towards the end of his Judgment, Mr. Justice Henchy goes on to state as follows: (At page 174)

"*The appellant's argument is that since the Commissioner is bound to value the premises before 1st March in its actual state, he could not take into account its condition when the reconstruction would be completed after 1st March. I do not accept this as a correct statement of the limitations of the Commissioner's functions. He must of course make the valuation on the premises in their actual state but since actual state connotes the premises as it stands with its potentialities and disabilities he may in order to achieve a correct assessment have to look at the past, present and future. As I said earlier, this case differs from that of an unfinished new house which has as yet no rateable occupier and has no real 'actual state' as a house. In such a case the Commissioner cannot make a valuation on the basis that the house will soon be finished or beneficially occupied. The position is different when the premises are beneficially occupied. If, for example, the hereditament being valued as a seaside boarding house or shop which the Commissioner finds closed without furniture or stock, he may have and ought to have regard to the use it was put to last summer and will be put to next summer. Gage v. Wrenn*; *Southend on Sea Corporation v. White. Conversely where the business is seasonal the premises are open for business and the Commissioner values them, he is bound to have regard to the fact that they will be closed when this season ends*."

In addition to the above statement of Henchy J., the Tribunal has the benefit of a Decision of the Valuation Tribunal in the case of Harcourt Inn Limited, Appellant and the Commissioner of Valuation, Respondent, Appeal No. VA00-3-052, Judgment of the Valuation Tribunal

issued on 19th April 2002. It is noted that this Decision was pursuant to the 1988 Act. Nevertheless it is of some assistance to this Tribunal when considering the matters at issue herein.

Briefly in the Harcourt Inn Limited appeal, Mr. Halpin for the Appellant had argued that the property at issue, in use as a hostel, should be valued by comparison to other hostel type premises in Dublin City Centre.

The Respondent's valuer, Mr. Dinneen, argued (a) that the property could and should be valued in line with similar type guesthouses; (b) the potential use of the property as an office should and could be relied upon as a persuasive measure of value.

It seems from the Decision that the Tribunal rejected Mr. Halpin's restrictive approach.

Equally, the Tribunal rejected the Respondent's suggestion that potential office use was, in the circumstances, worthy of consideration as offering a reliable and fair measure of rates:

> "*Whilst there is some merit in this argument, it cannot stand up to scrutiny insofar as buildings such as the subject may only be used in the manner for which there is planning permission. In this case the building has planning for hostel use and whilst it may be open for an incoming occupier to seek another use, the only viable alternative available without the need for substantial alteration works appears to be that as a guesthouse.*"

The Tribunal accepted that in the particular circumstances a guesthouse presented the most and/or the most reliable measure of value for the purpose of fixing the applicable rates.

> "*From the evidence in this appeal it would appear that whilst the subject is a hostel in name and insofar as planning is concerned, it is not dissimilar to a guesthouse and in the circumstances so should its rateable valuation.*"

Determination

Having considered the evidence as adduced, the arguments as made and the law as set out above, the Tribunal determines as follows:

(1) The Tribunal cannot look behind the commercial agreement which was freely entered into between the parties thereto and which, on the face of it, is an enforceable commercial agreement.

(2) The nature of commerce and contract is such that commercial entities ought to have room and space to negotiate such terms as they see fit and when the deal is closed, as it were, the parties must have the security of knowing that they can rely on and enforce the terms that they freely and voluntarily endorse.

(3) This freedom of bargaining inhibits and/or precludes and/or puts beyond the reach of most fora and in particular, this Tribunal, any issue which might be perceived as an attempt to question the fairness and/or validity of such commercial agreement.

(4) It follows that the Tribunal is bound to accept as evidence and without question:

(a) The validity of the two leases as entered into between the Appellant and the lessor.

(b) The fact as evidenced by the leases that the Appellant agreed to pay annual rent which amounts to €96,500.

(5) The hypothetical tenant, when he or she is considering putting in a hypothetical bid for the subject property must, by law, have regard to the following:

(a) The physical state of the property; the property herein originally designed and constructed for use as offices has been fitted out for use and is being used as a yoga studio with all of the attributes of same.

(b) Current use: Again and at the risk of being laborious, the property as at valuation date, has been fitted out as a yoga studio with all of the attributes of same.

(c) The hypothetical tenant is entitled to have regard to other potential uses. In so doing, he or she may well be constrained to conclude, as the Respondent has done, that the general locale is in the main dedicated to office use.

(6) Having decided to go down this road, the hypothetical tenant will no doubt ask himself or herself what the enthusiastic trigger-happy bidder is likely to pay for a ground floor office in the general locality.

(7) The astute hypothetical tenant will consider all the information that he or she has been given concerning ground floor offices within close proximity to the subject.

(8) Naturally and understandably he or she will turn to the adjoining property. It appears from the evidence as adduced that this entire building is in use as offices and is, it seems, valued as a single lot. The entire area encompassing as stated, the entire building, comes to 2,738.69 square metres. There are in addition car parking spaces fifteen in number. The hypothetical tenant will have noted without too much effort on his or her part that the area in question is significantly in excess of the size of the area that he or she is interested in. The hypothetical tenant is likely to inquire as to how much of the total value is being apportioned to the ground floor. He or she is not, it seems, given any or any reliable information on this.

(9) Thus, in the Tribunal's view, a hypothetical tenant is not going to pay too much heed to this particular piece of evidence when it comes to informing himself or herself as to how much he or she should consider paying in annual rent for the subject, save perhaps in the event that the hypothetical landlord insists on the hypothetical tenant paying the equivalent of €222 per square metre for the subject property, more likely than not, the hypothetical tenant will resolve to walk away.

(10) On the balance of comparable office properties, the hypothetical tenant will no doubt take account of the fact that they are ground floor. They are in relatively close proximity to the subject property. Even the largest of them is somewhat smaller in size than the subject but not so as to put the hypothetical tenant off further investigation and/or inquiry.

(11) Having made further inquiry, the hypothetical tenant is reliably told that ground floor offices smaller in size are paying between €130 and €150 per square metre.

(12) At this point in the process, the hypothetical tenant is, no doubt, contemplating a bid of €130 per square metre, or the equivalent in terms of NAV. Why he/she asks should he/she pay more than €130 for this particular ground floor premises currently in use as a yoga studio (hot yoga studio)? If anything he/she muses I should be paying less. He/she is bound to inquire what it is about this particular ground floor property that should encourage him/her to pay an annual rent towards the higher end of the range of prevailing rents.

(13) Having, at this point in the process, resolved not to pay a cent more than €130 per square metre, the hypothetical tenant meets Mr. Mulvey. For the purpose of this hypothetical exercise, Mr. Mulvey can be characterised as what might be termed, no offence intended, 'the landlord's agent'.

(14) Mr. Mulvey tells the enthusiastic potential bidder that the current tenant has been paying rent of €96,500 per annum which equates to, give or take, €352 per square metre. Mr. Mulvey informs the hypothetical potential bidder that the landlord is keen to let the property and is not seeking anywhere near this in terms of annual rent and is keen to get a tenant who is reliable and trustworthy and for this reason has put a value of €190 per square metre. Mr. Mulvey for his part, kind soul that he is, has persuaded the landlord to drop this, in turn, to the equivalent of €160 per square metre.

(15) At this point in the process the hypothetical tenant is 'biting', but not quite sure. Ostensibly he/she wants time to think over what for him/her is a significant investment. He/she has not as yet been given any clear reliable explanation as to why he/she should pay more than what might be termed base level (€130 per square metre) for this ground floor property.

(16) By chance, later on that evening the hypothetical tenant bumps into Mr. Halpin. They are acquainted. The hypothetical tenant knows that Mr. Halpin is in the business for a number of years. The hypothetical tenant tells Mr. Halpin that he is considering making a bid for a ground floor property situate in Ringsend. The hypothetical tenant tells Mr. Halpin what the prospective landlord is looking for. The hypothetical tenant has expressed discomfort at the fact that he has been asked to pay rent that he/she regards as being in excess of the higher end of the range of rents for office properties in the general area.

(17) The hypothetical tenant has told Mr. Halpin that the property is held under combined leases and is currently in use as a yoga studio. He also tells Mr. Halpin the annual rent which the property is currently yielding on foot of both leases. Mr. Halpin mulls it over. He tells the hypothetical tenant that in his opinion, the current use of the property is an important factor. Mr. Halpin emphasises that the current use cannot and should not be overlooked. The property is currently used as a yoga studio. Mr. Halpin advises that the rent which the hypothetical tenant can, or should be expected to pay, ought to be in line with properties of similar and/or equivalent use.

(18) Having researched the matter, there is very little available and/or reliable evidence in relation to yoga studios or hot yoga studios. There is little or no available evidence pertaining to yoga studios (hot yoga studios) in or around the area in which the hypothetical tenant has expressed an interest.

(19) Mr. Halpin feeds the hypothetical tenant with information concerning gymnasia across the city and their surrounds. Gymnasia are, Mr. Halpin reasons, broadly similar to hot yoga studios and are, Mr. Halpin reasons, comparable when considering in particular the use to which the property is being put and when considering the value a sensible and commercially astute hypothetical tenant might be willing to pay.

(20) Armed with this advice, the hypothetical tenant goes to 'the landlord's agent' Mr. Mulvey and makes a bid on the subject property which is, it must be said, is towards the mid-range of rent which one would expect to pay for a gymnasium in the locality in which the property is situate.

(21) Mr. Mulvey, conscious of what comparable properties in use as offices are yielding, and conscious of the rent being paid for the subject on the leases as relatively recently entered into, stands his ground.

(22) Hypothesis being what it is, the Tribunal is entitled to assume that the hypothetical tenant, notwithstanding rejection, would and if at all possible, like to have this property. The area in which the property is situate and the potential of the property for use as offices are significant drawing points for this hypothetical tenant.

(23) At this point in the process the hypothetical tenant has somewhat cannily, it must be said, held back a final bit of advice imparted to him by Mr. Halpin.

(24) Mr. Halpin advised the hypothetical tenant that he/she should (and because it is his/her entitlement) seek an appreciable discount on prevailing office rents because:

- The subject property is currently in use and has been fitted out as a yoga studio.

- A portion of the subject property or the more significant portion has planning permission for this particular use, that is to say, as a yoga studio.

- It appears from the leases as entered into that the landlord's custom (such as it is) is to have a tenant undertake the direct cost of conversion from yoga studio to office.

- Whilst not an entirely accurate indicator of the cost of such conversion, the current tenant paid €300,000 or thereabouts for the property to be fitted out from shell to yoga studio.

- More likely than not and as a consequence of all of this, the hypothetical tenant will be required to bear the cost and/or inconvenience of applying for Planning Permission (change of user) and of bearing the cost of conversion.

The hypothetical tenant, armed with this additional bit of advice and/or information from Mr. Halpin, goes to Mr. Mulvey with a view to seeking some reduction in the position as set by Mr. Mulvey when they last spoke. Mr. Mulvey is not for moving.

(25) It falls then for the Tribunal to decide whether Mr. Mulvey is correct in holding to this position and/or alternatively, whether there is merit in the argument for discount on the limited basis as set out (at paragraph 24) above.

(26) The Tribunal, having considered the evidence as adduced, the arguments as advanced, the legal and/or statutory framework within which the Tribunal must operate and in particular, the decision of the Tribunal as hereinbefore referred to and the reasoning set out therein, is of the view that this argument has significant merit.

(27) It follows and the Tribunal so determines that the Appellant is entitled to a discount from prevailing office rents to take account of the circumstances as set out (at paragraph 24) above.

(28) The evidence as adduced and insofar as it is reliable in the circumstances, establishes that prevailing office rents yield in the range of €130 to €150 per square metre for ground floor properties or premises.

(29) From available and/or reliable evidence, the subject property is best viewed as average with no evident physical attribute or impediment. It strikes the Tribunal as fair and in the circumstances to set the appropriate NAV for this property at the mid-range, that is to say, yielding €140 per square metre.

(30) For reasons that have been set out (at paragraph 24) above, the Appellant is, and in the Tribunal's view, entitled to a discount on this. The Tribunal is conscious of the fact that any discount as set must be fair and equitable, not only to the individual ratepayer (the Appellant) but also to all of the neighbouring ratepayers and so that they having elected to 'take their medicine', so to speak, are reassured that they are and in the circumstances bearing no more (no less) than their fair share of the total 'tax take'. Taking all of the above matters into consideration, the Tribunal is of the view that the appropriate discount to apply and in the circumstances is a discount of in the order of 15% (€8,081.99).

The Tribunal, having determined that the subject property ought, and having regard to the evidence as adduced, to have been placed at the mid-range of ground floor office premises of relatively equivalent and within relatively close proximity to the subject and having set this at €140 per square metre, this yields an NAV of €61,969.60 for the subject property. For reasons as set out above, the Tribunal applies to this NAV an adjustment and/or discount of 15%. Applying this discount (€8,081.99) to the NAV of €61,969.60, yields an NAV of €53,887.61 rounded to €53,888 or alternatively €121 per square metre.

And the Tribunal so determines.