Appeal No: VA17/3/022

AN BINSE LUACHÁLA
VALUATION TRIBUNAL

AN tACHTANNA LUACHÁLA, 2001 - 2015
VALUATION ACTS, 2001 - 2015

FIBONACCI PROPERTY ICAV	**APPELLANT**

AND

COMMISSIONER OF VALUATION	**RESPONDENT**

In relation to the valuation of
Property No. 5008797, Offices at Merrion Road, Ballsbridge, County Borough of Dublin.

B E F O R E

Carol O'Farrell - BL	**Chairperson**
Pat Riney – FSCSI, FRICS, ACI Arb	**Member**
Donal Madigan - MRICS, MSCSI	**Member**

JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 7TH DAY OF NOVEMBER, 2018

1. THE APPEAL

1.1 On foot of an application made at the commencement of the hearing, to which there was no objection from the Respondent, the Tribunal substituted Fibonacci Property ICAV for RGRE Ballsbridge Developments Ltd as appellant.

1.2 A Notice of Appeal was received by the Valuation Tribunal on the 19th September 2017 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 €1,871,000.

1.3 The grounds of appeal set out in the Notice of Appeal are

"The Commissioner of Valuation erred in law in failing to value the car park

as a separate property from the former office buildings which buildings were incapable of beneficial occupation at the material date for valuation. The valuation should be struck out and a separate valuation should be assessed on the car park only.

Without prejudice to the foregoing, the valuation as assessed is excessive, inequitable and bad in law."

1.4 In the Notice of Appeal the Appellant contended for a nil valuation in respect of the former office buildings and a valuation of €162,500 for the car park. It was also contended that the details on the Valuation Certificate are incorrect in that the Property is classified as Offices (2nd Generation) whereas the Appellant says that that it should be classified as a Car Park and that the Property (excluding the car park) ought to have been excluded from the valuation list as the office accommodation is not capable of beneficial occupation at the material date.

2. REVALUATION HISTORY

2.1 On the 25th September 2015, an application was made on behalf of Allied Irish Banks Plc ('AIB') to the Respondent for the appointment of a revision manager to exercise the powers under section 28 (as substituted by section 13 of the Valuation (Amendment) Act 2015) of the Valuation Act 2001 in respect of property No.786926 due to a material change of circumstance.

2.2 The revision manager accepted that a material change of circumstances did exist in respect of the Property since the last valuation of the Dublin City Council rating authority area to warrant the exercise of powers under section 28 of the Act and a copy of the proposed valuation certificate was issued in respect of the Property on the 11th October 2016 indicating a valuation of €1,871,000.

2.3 The subsequent representations made to the revision manager concerning the proposed valuation failed to persuade the revision manager to reduce the valuation and a final Valuation Certificate specifying a valuation €1,871,000 was issued on the 23rd August 2017. The Property was thereafter included on the valuation list together with its value as so determined.

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 24th and 25th of July 2018. At

the hearing Mr. Owen Hickey S.C. instructed by Evershed Sutherland Solicitors represented the Appellant and the Tribunal heard evidence from Mr. Donal O'Donoghue of OMK Property Advisors, Mr Pearse Sutton BSC(Eng), CEng. Dip.Struct.Eng. F.I.E.I., F.I.Struct.E., MAPEGS, PEng., R. Cons.EI, Dip.Env.Eng. Eng, Eur.Ing. LEED AP of Cronin Sutton Consulting, Mr. Francis McNulty of OCSC Consulting Engineers, Mr Desmond O'Broin of Linesight, and Mr. Gerard Brennan of John Spain Associates on behalf of the Appellant. The Respondent was represented by Mr. James Connolly S.C. and Mr. Michael O'Connell B.L. instructed by the Chief State Solicitor and Mr. John O'Brien BSc. (Hons) in Real Estate Management of the Valuation Office gave evidence on behalf of the Respondent

3.2 In accordance with the Rules of the Tribunal, the parties had exchanged their respective reports, précis of evidence and legal submissions and submitted them to the Tribunal prior to the commencement of the hearing.

4. ISSUE

4.1 This appeal raises the important issue of whether the Property comprising four unoccupied office buildings with no utilities or services are capable of being the subject of rateable occupation.

5. STATUTORY PROVISIONS RELEVANT TO THE ISSUE

5.1 The Respondent is obliged by section 13 (1) of the Valuation Act, 2001 ("the 2001 Act") as amended to provide for the determination of the value of all relevant properties (other than relevant properties specified in *Schedule 4*) in accordance with the provisions of the Valuations Acts 2001 to 2015.

5.2 By virtue of section 3 of the 2001 Act, "relevant property" must be construed in accordance with Schedule 3 and Schedule 3 which (in material part) provides:

> 1.—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, …

2.—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.

5.3 Section 48(3) of the Act as amended by section 27 of the Valuation (Amendment) Act 2015 provides for the factors to be considered in calculating the NAV:

"Subject to Section 50, for the purposes of this Act, "net annual value" means, in relation to a property, the rent for which, one year with another, the property might, in its actual state, be reasonably be expected to let from year to year, on the assumption that the probable annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in that state, and all rates and other taxes in respect of the property, are borne by the tenant."

6. THE EVIDENCE

6.1 Mr. Pearse Sutton, a Civil Structural Engineer with 31 years' experience confirmed that KP & Associates Consulting Engineers trading as Cronin and Sutton Consulting had been retained in October 2015 to review the situation following the disconnection of the existing foul drainage, water supply and fire hydrant services to the Property and to advise upon the remedial works required to provide new or re-connected services to render the Property operational. It was his understanding from a letter dated the 25th November 2015 sent by Allied Irish Bank (hereinafter "AIB"), to RGRE Ballsbridge Developments Ltd (hereinafter "RGRE"), that AIB had disconnected, separated and closed off all interconnecting services between the Property and the four buildings to the rear that were retained by AIB. That letter which was subsequently read into the record, confirmed that the Property *"does not have any legal right to use any pipes, drains, conduits, services, utilities, systems, or services of any kind in or under the balance of AIB's retained lands. This right ceased when AIB as tenant vacated Blocks A, B, C & D."*

Mr. Sutton explained that the existing AIB foul sewer needs to be diverted by the construction of a new foul drainage pipe within the AIB lands from Block E along the AIB service road to the AIB entrance on Serpentine Avenue and then a new foul drainage line with a new connection to the public sewer at the junction of Merrion Road and Serpentine Avenue would have to be constructed to service the Appellant's Property. The existing Fire Hydrant loop needs to be diverted by constructing a new fire hydrant pipe within the AIB retained lands from the Serpentine Avenue entrance along the AIB service road to the west of Block E and then reconnected to the existing Fire Hydrant loop. A new water main connection off Merrion Road and a new water supply pipe would have to be provided to serve the Appellant's Property.

Mr Sutton confirmed that subsequent to the receipt of the AIB letter Cronin & Sutton Consulting had meetings in 2017 with AIB senior officials and their professional consultants, Ove Arup, with a view to discussing how connections might be made into AIB's foul drainage, water supply and fire hydrant services without causing too much disruption to AIB but he said that final agreement could not be reached due to AIB's concerns.

In Mr Sutton's opinion the Property is not capable of beneficial occupation due to the absence of a water supply, an electricity supply and the absence of permission to connect into or use the foul sewer. Under cross examination Mr Sutton confirmed that he did not have any dealings with AIB during 2015 or 2016 and that he was unaware of the circumstances that had led to the AIB letter. He explained that the letter had been circulated by RGRE to Cronin & Sutton Consulting so that they could design new services to cater for the Property considering the constraints evidenced by the letter. He said planning permission would be required for the foul drainage and water supply works and that even if works could be carried out to reconnect the Property to AIB's existing services those works would have to cross the service road in the ownership of AIB. He agreed that subject to obtaining planning permission and approval from Irish Water there was no impediment to the construction of new connections along Merrion Road, but the installation of a new surface water main down the Merrion Road into the river at Ballsbridge would require significant infrastructure. When it was put to him that the Drainage Division of the Engineering Department of Dublin City Council supported the proposed foul drainage and water main works outlined in the Engineering Service Report dated 3rd February 2016 submitted with the planning application for demolition of the Property and the construction of two six-storey office buildings, Mr Sutton pointed out that a new surface water connection from the Merrion Road to the river was inserted as a condition of the planning permission because the property is situated in a flood zone. When asked what impediments there would be to AIB availing of the services if AIB were to re-occupy the Property as

tenants, Mr Sutton surmised that AIB would simply help themselves by making the necessary connections.

6.2 Mr. Francis McNulty, a Mechanical and Electrical Engineer, gave evidence that O'Connor Sutton Cronin (M& E) Ltd was requested by RGRE to inspect the condition of the mechanical and electrical service systems serving the Property in the summer of 2017. He stated that the four office blocks comprising the Property received their primary utilities and general services from the central energy centre operated from the AIB buildings to the rear of the Property and as those services have been disconnected, new utilities including electricity, water supply, chilled water, heating, ventilation, central security monitoring and a building management system would have to be installed. He confirmed that the electrical cables had been disconnected and coiled back onto AIB's property but that a temporary unmetered supply of electricity had been left for security access and to maintain fire alarm connections.

In his Précis of evidence Mr McNulty described the mechanical and electrical services system originally installed in the Property as well as the site utilities, all of which had been disconnected. He outlined the necessary actions that would have to be taken to put the buildings back into operation. An application would have to be made to the ESB to reinstate power and, a planning permission would have to be sought for a new external substation. He confirmed that there had been a discussion with the ESB about re-connection at which time it had been indicated that due to deficit in the ESB network in the area the connection would have to be made either back to the South Lotts Road or up Merrion Road to the Elm Park substation involving a 3-kilometre reconnection cable run. He explained that the ESB does not discuss reconnections in detail until a full formal application is submitted supported by a grant of planning permission.

He also explained that the ESB provide an electricity supply in accordance with a maximum demand tariff which is determined by reference to the size of the required connection. Electricity is charged not just on the basis of usage but also by reference to the applicable tariff category for the property. Given that the electricity supply to the Property was disconnected more than 3 years ago, Mr McNulty believes it is not simply a matter of reconnection due to the pressures on the ESB network and the possibility that the maximum demand tariff may have been lost to other properties in the area. Based on his experience, it was Mr. McNulty's opinion that the disconnection of the electricity supply would have resulted in the loss of maximum capacity and a new ESB substation would be required. Mr McNulty said that the Property also requires a new life safety generator, new telecommunication and data lines involving new ducting to local supplies on the public road and new internal infrastructure such as new security systems and new building management systems to operate air conditioning, heating, etc., the overhaul and re-

certification of the fire alarm systems, a new boiler house and gas supply, new cooling plant, new fire hose reel water supply equipment and fire hydrant, new water connections from the public main, and a new site lighting system. In his opinion the buildings could not be re-occupied without the re-instatement of those services and even if AIB were to re-occupy the Property those reconnection and refitting works would still have to be carried out.

On cross examination Mr McNulty confirmed that the Property was in much the same condition on the 23rd August 2017 as it was when inspected on the 8th September 2016. However, he did not accept the proposition that the Property could be used simply by re-connecting electrical services as the ESB is under severe pressure to meet electricity demand for new properties in the area and the additional network capacity required to serve the four buildings of the Property would necessitate a new substation which would require planning permission. When it was suggested that if AIB were to re-occupy the Property planning permission would not be required, Mr McNulty said that the AIB would still have to apply to the ESB for re-instatement and that there would be no guarantee that the ESB would be able to provide the maximum capacity required for the Property and in his opinion AIB would probably have to obtain planning permission for a new substation.

6.3 Mr Gerard Brennan, a Senior Planner with John Spain Associates, gave evidence that his firm was requested to review the evidence of Mr Sutton and Mr McNulty to advise whether planning permission would be required for the works identified as being necessary to render the Property fit for occupation. He confirmed that planning permission would be required for a new ESB substation and construction of plant decks and boiler rooms at roof level. He set out the time periods for each stage of the planning process. He confirmed under cross-examination that if a tenant were to take up occupation that planning permission would be required to carry out the works identified by Mr Sutton and Mr McNulty. He confirmed that if AIB were to resume occupation of the Property such occupation would be lawful in term of planning law but having regard to the evidence of Mr Sutton and Mr McNulty it was his view that quite a lot of work would have to be done to reinstate the services to enable AIB resume occupation. He did not accept that the necessary reconnection works would be of a lesser order than those that would be required by a new tenant if AIB were to re-occupy. In his view, the works would be the same for AIB as any other tenant. He accepted that AIB could occupy the Property if no works requiring planning permission were required but, if the works identified by Mr Sutton and Mr McNulty to reconnect the buildings to services were required, AIB would have to obtain planning permission.

6.4 Mr. Desmond O'Broin, Director of Linesight, a firm of Construction Consultants specialising in quantity surveying and project management, gave opinion evidence

based on his experience and surveys of the Property of the costs of the works required to be carried out by a tenant to make the Property suitable for occupation. His firm had been approached in 2014 to cost the redevelopment of the Property and in 2016 had been requested to assess, for a potential funder, the minimum reinstatement costs. Mr O'Broin gave evidence that new entrances and reception areas would be required, and he outlined the minor repairs, cleaning and decorative works that would have to be done, the new mechanical service installations that would be required and of the servicing, testing and commissioning of various services and systems. In his view, the minimum cost of the works would be €9,174,000 excluding value added tax and he estimated the necessary non-construction costs in the sum of €2,280,000 excluding value added tax, all of which was itemised in Appendix A of his Précis of evidence.

Mr. O'Broin confirmed that a proposal to make an ESB connection to the South Lotts had been costed at €1,450,000 inclusive of the substantial capital contribution that would have to be made to the ESB. In terms of the works programme he said that it would have to be clarified whether the ESB had capacity in the system locally and that it was his understanding there was no capacity. He pointed out that as the existing power comes through the AIB energy centre, the ESB would insist upon a new separate substation having road access. The ESB had previously advised that the power supply would have to trenched from either Donnybrook or the South Lotts Road. His cost estimate was based on South Lotts Road over 1.4 km to 1.5 km but if the electricity supply had to be trenched to the Elm Park Road over 3 km the cost of the trench work and traffic management would be exceed €1,450,000.

Based on experience he estimated the planning process would take at least 10 months and the works programme 18 months. Mr. O'Broin detailed the programme for the completion of each aspect of the works involved in the re-connection of the electricity supply, the gas supply and the water supply and drainage work in Appendix B of his Précis. He confirmed under cross-examination that he had not costed the works based on AIB renewing their tenancy of the Property. When asked what costs would be incurred if AIB were to resume occupation, Mr. O'Broin stated that in his view AIB would have to apply to the ESB to re-connect the electricity supply and the cost would depend on whether the ESB network had capacity to meet the maximum demand the Property would require but that he had not assessed the cost involved in such a scenario.

6.5 Mr. Donal O'Donoghue, a Valuation Surveyor with 23 years' experience outlined the history of the revision application following the subdivision of the Property from the property formerly owned by AIB. He acknowledged that the Property comprises four former office buildings and is situated in a prime location on 3.7 acres, that the internal floor measurement and car space numbers are agreed and that the Appellant is the freehold

owner. He stated the appeal Property was sold by AIB to Mountbrook Merrion Road Development Ltd (hereinafter "Mountbrook") in 2006 and was subsequently purchased by RGRE Ballsbridge Developments Ltd (hereinafter "RGRE") in October 2015 in a receivership sale and thereafter was transferred by RGRE to the Appellant in May 2016.

Following the sale to Mountbrook, AIB remained in occupation of the Property under a lease until December 2014. Mr O'Donoghue stated that upon vacating the Property AIB disconnected all services, utilities and systems whereupon the Property ceased to have any right to use or connect to those services as was confirmed in the AIB's letter of the 25th November 2015. He stated that RGRE acquired the Property with a view to redevelopment, the intention being to create a more intensified use of the Property, and that planning permission had been obtained for demolition of the Property and the construction of two new office buildings.

Mr O'Donoghue did not accept that a tenant would be prepared to take a lease of the Property at a rent of approximately €1,900,000 in circumstances where he would have to carry out significant works at significant costs over an estimated period of 18 months to recommission the services to bring the buildings back to habitable condition for office use. Mr O'Donoghue contended that the Property should be valued in accordance with its "actual state" as of the material date, the 23rd August 2017, which the parties had agreed, was in no different condition to that upon inspection on the 8th September 2016. Mr O'Donoghue pointed to the evidence concerning the physical condition of the Property arising from the isolation and disconnection of the services and the works and planning permission required to render the Property lettable as detailed in the survey reports furnished by Mr Sutton and Mr McNulty. He stated that the works required could not be considered minor in nature.

Mr O'Donoghue expressed the opinion that the Property, excluding the car parking spaces, having been vacant since December 2014 were unlettable and therefore incapable of beneficial occupation for use as offices owing to the time and costs involved in re-commissioning the necessary services and systems. He stated that he did not believe that any hypothetical tenant would pay almost €1,900,000 in annual rent and €500,000 in rates in circumstances where he would not be able to occupy the Property for a period of 18 months. In his view, the Respondent's determination of value was excessive and bad in law and that the car park spaces should be valued at €162,500 as a separate property from the former office buildings. In his opinion the likelihood of AIB reoccupying the Property was too remote given that AIB had signed high profile leases in the Leopardstown Central Park area and were moving their corporate head offices to Molesworth Street. Under cross examination Mr O'Donoghue confirmed that the only issue on appeal reference VA14/5/377 Allied Irish Banks v Commissioner of Valuation (before the subdivision of

the AIB Bank centre had occurred) was the value of the car parking spaces. He agreed that the AIB letter confirmed that AIB would not resist the efforts of an incoming tenant to secure the reconnection of services provided the AIB land were not affected. He clarified that demolition works had not been commenced at the Property but that the first tender had gone out for the initial enabling works involving the demolition of the four office blocks and the diversion and re-location of the pipework, cables and other conduits used for the transmission of services to AIB's retained property and he was advised that those works were due to commence in September 2018.

6.6 On behalf of the Respondent, Mr. John O'Brien, a Valuer with 10 years' experience in rating and valuation, gave an outline of the history of the revision application which did not differ in any respect from that given by Mr O'Donoghue. He gave evidence that he inspected the Property on the 8th September 2016 with Mr. O'Donoghue and Ms. Murphy of GVA Donal O'Buachalla (representing AIB). He confirmed that the internal floor areas were not in dispute and that only the ground and first floors of Blocks C and D were inspected as he was assured by the parties' agents that Blocks A and B were of the same specification and standard as Blocks C and D. He referred the Tribunal to the internal and external photographs that he had taken of the Property and observed that the suspended ceilings, raised floors, air conditioning units and the internal walls were in good condition and that the Property was fitted to a good standard comparable to other 2nd generation offices in the area. When asked to give his opinion as to whether the Property was capable of beneficial occupation he stated in valuing the Property he was required to assume that it was in reasonable condition and state of repair for its age, profile and construction.

Turning to properties on the valuation list, Mr O'Brien relied upon 4 properties in the Ballsbridge area which in his opinion shared similar characteristics with the Property as clearly establishing a tone of list that supported a rental value of €180 per sq. m. for second generation offices. The AIB Bank Centre was relied upon as the valuation of that property had been determined by the Valuation Tribunal under Appeal Reference VA14/5/377. Mr. O'Brien considered that the Property was capable of occupation subject to works being carried out to reconnect services and as the valuation of the Property fell to be determined by reference to the values of comparable properties appearing on the valuation list under section 49(1) of the Valuation Acts 2001-2015 he considered the rateable value of the Property as determined by the Respondent to be fair, reasonable and equitable. He stated that, on inspection dates, valuers were required to assume that all properties are maintained to a reasonable condition and state of repair by the hypothetical tenant considering the age, profile, construction and location of the properties. He stated that he considered the Property to be in a premier site and so on the date of the inspection he assumed the Property was in reasonable condition considering its age, profile and construction. He saw no difference between the Property and other second-generation offices that he had inspected

in the Ballsbridge area. He stated that he assumed services were readily available at the date of inspection and on the relevant valuation date. When asked for his opinion on the letting ability of the Property having regard to section 48 of the Act, he stated that a reasonable period for a lease would have to be assumed and even though a short period would not be discounted, a period of between 10 and 25 years would be considered appropriate for this type of property. He said a tenancy of 25 years would assume more value given that the costs associated with taking a 1-year lease of the Property would give rise to more substantial costs than would a 25-year lease.

In response to Mr Hickey's question whether he would value a property in poor state of repair as if it were in good repair, Mr O'Brien confirmed that he would. He stated that based on his inspection he considered the Property to be like other properties that he had inspected in the past. In his opinion the buildings were in a reasonable condition and state of repair and in his opinion the absence of services connections did not mean that the Property was incapable of beneficial occupation. He confirmed that he knew the services were disconnected but he assumed reconnection would be feasible and economical. He agreed that he had valued the Property as if it were connected to all main services and as if the difficulties concerning the Property did not exist. He explained that he had assumed that water and electricity services were readily available on the Merrion Road or on the adjacent roads to the Property. He accepted that there would be associated costs and time constraints in reconnecting the services but in his view a tenant would be willing to assume those costs over a long term lease of say 20 years. He confirmed that he did not make any enquiries as to the actual costs, or the duration, of such works.

7. THE FACTS

7.1 From the evidence, the Tribunal finds the following facts.

7.2 The Property is situated at the junction of Merrion Road and Serpentine Avenue in Ballsbridge, Dublin 4 directly opposite the Royal Dublin Society and can be accessed from Merrion Road and Serpentine Avenue. The Property is situated on 3.7 acres and comprises four vacant three and four-story office buildings known as Blocks A, B, C and D. There are 65 surface car parking spaces serving the Property. The Property was built circa. 1977 and was formerly part of the Allied Irish Bank Centre. The total net internal area within the Property is agreed at 10,369 sq. m.

7.3 The Property was formerly part of a larger site comprised in Folio 4600F of the Register County Dublin until it was sold by AIB in 2006 to Mountbrook subject to and with the benefit of an occupational lease between AIB of the first part, Kavwall Limited of the

second part and Fullplex Management Limited of the third part. Following the expiry of that lease AIB on the 5th July 2011, AIB secured a lease of the Property from Mountbrook up to the 31st December 2014. In October 2015 RGRE purchased the Property and its interest was transferred to the Appellant by Deed of Transfer dated the 26 May 2016.

7.4 Upon the initial sale of the Property to Mountbrook in 2006 no easements were reserved over Folio DN4600F for servicing the Property and the Deed of Transfer expressly excluded any implied easements over Folio DN4600F. AIB reserved the right under the 2006 Deed of Transfer to disconnect and close any interconnecting services, systems and openings between the Property and the buildings to the rear of the Property which continued in the ownership and occupation of AIB.

7.5 Upon the expiry of AIB's lease on the 31st December 2014 the Property became vacant and since that date has remained vacant.

7.6 After vacating the property AIB disconnected all the services to the Property though a 20-amp electricity supply continues to be maintained for life systems. As a result, the four buildings have no lighting or power, no water, no foul drainage or fire alarm system.

7.7 Following the acquisition of the property by RGRE in late October 2015, AIB confirmed by letter dated the 25th November 2015 AIB that the owner or occupier of the Property *"does not have any legal right to use any pipes, drains, conduits, services, utilities, systems, or services of any kind in or under the balance of AIB's retained lands".*

7.8 Discussions were had by Cronin Sutton Consulting on behalf of RGRE with AIB's consultants to discuss the making of connections into the AIB foul drainage, water supply and fire hydrant services. Agreement could not be reached with AIB due to concerns about works taking place in proximity to the cash office and the disruption that would arise from works being carried out on or in the proximity of the AIB service road.

7.9 A joint inspection of Buildings C and D of the Property took place on the 8th September 2016. It was agreed between the parties that the appeal could proceed on the assumption that Buildings A and B of the Property were in a similar condition to Building C and D and that there was no relevant difference in the condition of the Property between the joint inspection date on the 8th September 2016 and the material date for valuation.

7.10 The material date for valuation of the Property is the 23rd August 2017 and on that date the electricity supply was cut off and the cabling removed, and the Property had no access to foul drainage and water supply services.

7.11 At the material date for valuation the Property was empty and no demolition or development works had taken place.

7.12 In the absence of any material evidence to the contrary from the Respondent, the Tribunal accepts Mr O'Broin's opinion that the total costs of the reconnection work and the commissioning of the Property's main services would be in the region of €12,000,000 and that the works would take approximately 18 months to complete.

8. APPELLANTS SUBMISSIONS

8.1 Mr Hickey emphasised that this appeal falls to be considered on its own unique facts and aside from the fact that the Property is incapable of beneficial occupation, an important though not decisive factor was that the Property was acquired not for use but for demolition and redevelopment. Reading the definition of "occupier" in section 3 of the 2001 Act together with the definition of "net annual value" in section 48 he observed that a property must be capable of being used and enjoyed in its actual state and whilst there is a plethora of authority which can be cited on what constitutes beneficial occupation for rating purposes, each case was dealt with on its own facts none of which are properly analogous to the appeal Property.

8.2 Counsel relied on the following passage in *Harper Stores Limited v Commissioner of Valuation* [1968] 1 IR 166 at 172 wherein Henchy J. gave guidance on the meaning of the words "*actual state*" in relation to a relevant property:

> *"The use of the words "actual state" in reference to the hereditament 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 and Metropolitan Railway Companies v. Kensington Assessment Committee "the hereditament should be valued as it stands and as used and occupied when the assessment is made". While the tenant and the tenancy are imaginary or hypothetical, the hereditament may not be looked upon as anything other than the actuality or reality which it is. As Lord O'Brien, L.C.J., said in Armstrong v. Commissioner of Valuation: -"The words 'actual state' were introduced to ensure that the hereditament or building was valued such as it was, rebus sic stantibus, and to prevent speculation as to mere contingencies, speculations as to what the value of a house might be under conditions different from those subsisting."*

8.3 Relying on the opinion evidence of Mr O'Donoghue that the property is unlettable, the evidence of Mr O'Broin that it would cost approximately €12,000,000 to carry out

reconnection works to render the Property capable of beneficial occupation and a period of 18 months to complete those works, Mr Hickey submitted that there was no question of use or enjoyment of the Property as offices in the classic sense at the valuation date and nor could there be, in his submission, any question of resuming office use within a reasonable period. He observed that the facts of this appeal are wholly distinguishable from those adverted to in *Harper Stores* where Henchy J. had found that a 10-week interruption of the appellant's occupation of the premises while contractors carried out construction works did not the sunder the appellant's rateable occupation but constituted a mere variation of the mode of the appellant's continuous use of the premises for their business. He submitted that expenditure of €12,000,000 based on an 18 month works programme could not be interpreted as a mere interruption of an occupier's mode of occupation.

8.4 Counsel characterised Mr O'Brien's evidence that he had inspected and viewed the Property on the basis that no difficulties existed in respect of the Property as extraordinary and submitted that no proper consideration had been given by the Respondent to the fact that the Property had no services and were incapable for use for offices. He submitted that all the comparable properties relied upon by the Respondent were normal office buildings capable of use as offices. He criticised the choice of the AIB property to the rear of the Property as the primary comparable given that no consideration or allowance was made for the fact that the Property unlike the AIB property and the other comparable buildings in the locality had no services. He submitted that there was no reason why a hypothetical tenant would pay the same rent for the Property as that obtainable for the AIB property bearing in mind the Property's actual state at the valuation date.

8.5 Even if it were relevant to take AIB into account as a potential tenant of the Property, Counsel argued that having regard to Mr. McNulty's evidence that AIB would require permission to connect the Property to the ESB network and given the capacity required to operate the buildings AIB would likely have to construct a new substation in accordance with ESB specifications to re-establish themselves in the Property.

9. RESPONDENT'S SUBMISSIONS

9.1 Mr Connolly handed in a copy of the Valuation Tribunal' decision of the 2nd August 2016 in VA14/5/377 - Allied Irish Banks v Commissioner of Valuation. He pointed out that the Respondent had adopted the basic values which the Tribunal had adopted when determining the value of the AIB Bank Centre Headquarters prior to subdivision and that the valuation of the Property as determined by the Respondent was in line with the tone of the list.

9.2 He submitted that although the Appellant had purchased the Property for new office development, the fact was that the Appellant had acquired offices capable of being let

subject to making necessary service reconnections. He characterised as artificial the argument that the Appellant had purchased the Property with a view to demolition and redevelopment in circumstances where the Appellant's true intention was to operate a business of letting office space from the Property. He submitted that one had to look at the Property as it stands on the valuation date and at that time the Property was neither derelict nor open to the elements and in terms of rating law was capable of beneficial occupation.

9.3 Counsel referred to the essential ingredients of rateable occupation identified by Mr Justice Ronan Keane in The Law of Local Government in the Republic of Ireland (1982) and referred to by O'Hanlon J. in *Telecom Éireann v Commissioner of Valuation* [1994] 1 IR 66:

> "(1) Exclusive, in the sense that the person using the hereditament can prevent any other person from using it in the same way;
> (2) Of value and benefit to the occupier, but not necessarily of financial benefit;
> (3) Not for too transient a period".

It was submitted that the Property is of value and benefit to the Appellant even thought it might not be intending or able to let it because the Appellant cannot proceed with the proposed development without owning the Property. He stated that once the builders go on site they will occupy as agents of the Appellant and the benefit to be derived by the Appellant is the long-term use of the Property for renting out as office space.

9.4 Reference was made to London County Council v. Churchwardens and Overseers of the Poor of the Parish of Erith [1893] AC 562 where the House of Lords held that occupation could be beneficial even if it were not profitable. On the facts of that case there was a real benefit to the Council in being able to pump and transport the sewage and it was in that context that Lord Herschell stated that the true test is whether the occupation is of value, in contrast to the position where the land is "struck with sterility" into whosesoever hands it came, with the result that its occupation could be of no value to anyone.

9.5 Counsel next submitted that there was an over reliance on an historical letter (i.e. the letter of the 25th November 2015) and no evidence had been adduced that the Appellant had recently contacted AIB to seek permission to make connections to the services. In the alternative, it was argued that AIB must be considered a possible hypothetical tenant in which case Counsel submitted there not would be any obstacle to connecting to the existing AIB services in which case the significant reconnection costs would not be incurred. Separately from that argument Counsel further contended that AIB could permit connection or access to services by another hypothetical tenant and it would not be correct to assume that a hypothetical tenant could not reconnect even though reconnection would entail costs which would probably impact on the level of rent.

9.6 Separately from all the foregoing, Counsel pointed out that the figure of €12,000,000 adduced by the Appellant as being the total cost of reconnection was an indicative cost only and that no clear evidence had been adduced as to the cost relating solely to reconnection because the Appellant's starting point was to estimate the cost of establishing new connections so as not to be reliant upon the existing AIB services rather than engaging with the ESB and AIB and renegotiating terms for reconnection to services that are extant on the AIB property.

9.7 Several authorities were cited. Whilst all have been considered by the Tribunal, we refer only to those opened by Counsel. The first was *Vyricherla Narayana Gajapatiraju v Revenue Divisional Officer, Vizagapatam* [1939] AC 302. Though this case was concerned with compensation for land that had been compulsorily acquired, Counsel submitted that the valuation principle applied in that case is equally applicable in rating law. That principle was set out by Lord Romer as follows:

> *"For it has been established by numerous authorities that the land is not to be valued merely by reference to the use that it is being put at the time at which its value has to be determined (that time under the Indian Act being...) but also by references to the uses to which it is reasonably capable of being put in the future. No authority indeed is required for this proposition. It is a self- evident one. No one can suppose in the case of land which is certain, or even likely, to be used in the immediate or reasonably near future for building purposes, but which at the valuation date is waste land or is being used for agricultural purposes, that the owner however willing a vendor, will be content to sell the land for its value as waste or agricultural land as the case may be"*

Reference was also made to the following passage at page 431:

> *"If the owner of the land is the only person who can do so, the value to him must be ascertained by reference to what profit he might thereby have been able to derive from the land in the future. Take as an example the case of an owner of vacant land that adjoins his factory. The land possesses the potentiality of being profitably used for an extension of the factory. But the owner is the only person who can turn that potentiality to account. In valuing the land, however, as between him and a willing purchaser, the value to him of the potentiality would necessarily have to be included."*

9.8 The Court of Appeal's decision in *Tomlinson v Plymouth Argyle Football Company Ltd & Or* [(1960) 53 R and I T 297 was put forward as authority that only one hypothetical tenant is required for a valuation to occur. That case involved a sole potential tenant for a football ground. Pearce LJ. warned that a court must not assume hypothetical tenants for a property

if there is in respect of that property no reasonable possibility of such tenants existing. In that case it was clear that there could be no hypothetical tenant other than the club of the football ground.

9.9 The Respondent argued that mere unusability is not determinative as regard must be had to the potentiality of premises and relied upon the following passage in the Harper Stores case as providing a full answer to the Appellants argument that the Property is incapable of office use:

> *"The Appellant's argument is that, since the Commissioner, was bound to value the premises before the 1st March in its "actual state", he could not take into account its condition when the reconstruction would be completed after the 1st March. I do not accept this as a correct statement of the limitation 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 all its potentialities and disabilities, he may to achieve a correct assessment, have to look at past, present and future."*

9.10 It was submitted that the Tribunal should be cognisant of the warning sounded in *Easiwork Homes Ltd v Redbridge London Borough Council* [1970] 2 QB 406 as to the danger of excluding liability in respect of property which for the time being is incapable of beneficial occupation as it could lead to widespread abuse as a property owner could decide to keep his property unoccupied for a substantial period of time by removing items such as sanitary fittings though Counsel did clarify that he was not contending for abuse on the facts of this appeal.

9.11 In *Mayor of Southend on Sea v. White* [1900] 65 JP 32 the occupier of a shop used only during the summer season and in *Gage v Wren* [1902] 67 JP 32 the lessee of a house used as a boarding-house during the summer season were held to be in beneficial occupation during the winter months when their premises were shut up as the occupiers had left behind chattels in the premises evincing an intention to return to the premises the following summer to resume their respective businesses.

9.12 A number of Valuation Tribunal decisions were also relied upon but as there are a number of obvious factual differences between those appeals and the present one they provide little assistance.

10. DISCUSSION AND FINDINGS

10.1 It is well established that for "occupation" to attract liability to rates the occupation must be "beneficial occupation" and the phrase "beneficial occupation" does not mean profitable occupation.

10.2 It is also a well-known principle of valuation, that relevant property must be valued (on the basis of an assumed tenancy from year to year) taking account of its existing use and physical state. The principle was stated by Lord Buckmaster in *Poplar Assessment Committee v Roberts* [1922] 2 AC 93 as follows:

> *"[A]though the tenant is imaginary, the conditions in which his rent is to be determined cannot be imaginary. They are the actual conditions affecting the hereditament at the time when the valuation is made."*

10.3 Since the commencement of the 2001 Act, unoccupied relevant property has been rateable, so the proper test of rateability is no longer whether property is in beneficial occupation, but rather whether it is capable of beneficial occupation. It is common case that the Property comes within categories (a) and (b) of paragraph 1 of Schedule 3 of the 2001 Act and, in the context of paragraph 2(a) of that Schedule, it is unoccupied. That being so the Tribunal has to determine whether the Property is capable of being the subject of rateable occupation by the owner.

10.4 The Appellant is the freehold owner in possession of the Property. The Tribunal is satisfied on the evidence that there has been no actual occupation, use or enjoyment of the Property by the Appellant since it was purchased in May 2016. The current non-usage did not result from any decision taken by the Appellant. The disconnection and separation of the Property from Blocks E, F, G and H and closing off of all interconnecting, services, systems and openings was carried out by AIB after they vacated the Property in December 2014. In the circumstances, this clearly is not a case of an owner of property by its own volition depriving itself of a benefit it might otherwise have received from property. The Appellant acquired the Property in its current condition and the Tribunal is satisfied that the Appellant acquired the Property never intending to use it for offices or for any other purpose. It was acquired to be demolished for an entirely new office development.

10.5 The essence of the Appellant's appeal is that the Property must be valued as it physically existed on the material valuation date and, on that date, it was incapable of beneficial occupation for its intended or any purpose as it lacked the essential services which any hypothetical tenant would require. In that respect the Appellant contended that no tenant would be willing to expend an approximate sum of €12,000,000 on re-connection works

over an 18-month period to render the Property capable of beneficial occupation. The Appellant contended for a nil valuation in respect of the former office buildings and a valuation of €162,500 for the car park.

10.6 The Respondent approached the issue of whether the Property is capable of beneficial occupation by considering to what extent the three ingredients for rateable occupation are satisfied. Although the Appellant does not physically occupy the Property, the Respondent says the Property is nonetheless of value to the Appellant because it enables the Appellant to undertake its business and the Property is capable of being let subject to re-connecting the services. The valuation evidence provided by Mr. O'Brien relied on the established tone of the list for 2nd Generation office properties in the vicinity of the appeal Property at €180 per sq. m. Though no contrary evidence was relied on by the Appellant to suggest that this tone was inaccurate, a strenuous objection was raised to the notion that the appeal Property was comparable to the properties that had been identified by Mr O'Brien.

10.7 In the Tribunal's view the evidence given by Mr. O'Brien that the Property must be assumed to be in a reasonable condition and state of repair for use as office accommodation would involve a major departure from the principle of reality. This principle is recognised in section 48 of the 2001 Act in that it requires properties to be valued by calculating the rent for which, taking one year with another, the property might in its actual state be reasonably expected to let from year to year, the tenant bearing the annual cost of repairs, insurance and other expenses (if any) that would be necessary to maintain the property in its actual state. The Tribunal sees no justification in section 48 for an assumption that property is in reasonable condition and state of repair prior to the hypothetical letting. The express statutory assumption as to the nature of the hypothetical tenancy is that the property is to be valued in its "actual state" as opposed to an assumed state of reasonable condition and repair.

10.8 Mr. O'Brien's evidence was that the Property was capable of beneficial occupation subject to making necessary service reconnections. He agreed that he had valued the Property as if it had all the necessary service connections. He accepted that there would be associated costs and time constraints in reconnecting the services, but he had made no enquiries as to what those costs would be or as to the duration of the necessary works. It was Mr O'Brien's view that a tenant would be willing to assume the reconnection costs over a long lease of about 20 to 25 years. His evidence was that a reasonable period for a lease of between 10 and 25 years would have to be assumed for this type of property given those costs involved, though a shorter period would not be discounted. While it is fair to assume that both the hypothetical landlord and the hypothetical tenant would contemplate that a tenancy from year to year would have a prospect of continuing for a period of time, it would be wrong in our view to convert a tenancy from year to year into a fixed term tenancy. That is not to say that the

prospect of the continuance of the tenancy would not be a factor that the hypothetical landlord and the hypothetical tenant would have regard to when negotiating the hypothetical rent.

10.9 The Tribunal accepts the evidence of Mr. Sutton and Mr. McNulty and are satisfied that at the material valuation date the Property was in the condition that they described, and the Tribunal accepts the evidence of Mr. O'Broin that the Property requires expenditure of approximately €12,000,000 to put it into a lettable condition using 2017 building costs. Though the Respondent sought to test this evidence, no expert evidence was adduced by the Respondent to displace Mr. O'Broin's estimate of the costs of the necessary works or of timescale for the completion of the works.

10.10 On any view, electricity, water and foul drainage would have to be installed for any tenant to use the Property as offices. The reality principle requires the Property to be valued in its actual state. According to Henchy J. in *Harper Stores Limited v Commissioner of Valuation* the words "*actual state*" in section 11 of the Valuation (Ireland) Act 1852 in relation to a hereditament are to be understood as meaning that "*the hereditament may not be looked upon as anything other than the actuality or reality which it is*". In the Tribunal's view, those words retain the same meaning in the context of section 48 of the 2001 Act. The fact is that in its existing state on the valuation date the Property has none of the aforementioned services. In those circumstances the actual state of the Property is a matter the hypothetical tenant would consider when measuring his rental bid against the known rents of office buildings in the locality which are not so afflicted. There is no justification in section 48 for an assumption that the Property is in reasonable repair and condition prior to a hypothetical letting, which is the basis upon which the valuation of the Property was determined.

10.11 The Respondent says that Property is of value and benefit to the Appellant because the Appellant cannot proceed with redevelopment without owning the Property. Once the builders go onto the site they will occupy as agents of the Appellant and the benefit to be derived is the prospective long-term use of the Property for letting as office space. But that position had not materialised at the valuation date. It is clear from the authorities relied upon by the Respondent that a slight user of land by its owner in possession will be sufficient to render him liable for rates as a beneficial occupier. The Respondent relied upon Henchy J's. observation in Harper Stores that because the words "actual state" connotes the premises as it stands with all its potentialities and disabilities, the Respondent may in determining the value of property look at the past, present and future but that observation must, in the Tribunal's view, be seen in light of the particular facts and specific issue in that case, namely whether a shop which was undergoing reconstruction on the valuation date was capable of beneficial occupation. The occupier continued to trade in the

shop when the works were initially commenced, vacated the shop approximately four weeks later when the works reached a point where trading became impossible and resumed occupation approximately 10 weeks later. On those facts Henchy J. held that there was a continuous intention to use the premises as a shop by the occupier and a continuous user of it as a shop and the reconstruction "*was but an episode*" in that continuous user. The facts which the Tribunal is concerned on this appeal case are unusual and altogether different.

10.12 It would cost approximately €12,000,000 to reconnect the Property to services in order to command a rent of €1,871,000 per annum. The Tribunal accepts the Appellant's argument that no hypothetical tenant would be willing to take a letting of the Property at that rent in circumstances where he would have to expend such a significant sum on reconnection works that would take 18 months to complete. Even if the Tribunal were to accept the Respondent's argument that all that is required for a valuation is one hypothetical tenant, and assuming no hypothetical tenants exist the Appellant would have to be considered the sole hypothetical tenant, the Property is not hypothetical, and it would still have to be valued in its actual state. The absence of consent to use any pipes, drains, conduits, services, utilities, systems or services of any kind in or under the Property has, in the Tribunal's opinion, so adversely affected the Property that it has rendered it incapable of beneficial occupation.

10.13 Accordingly, the Tribunal finds that the buildings A, B C and D of the Property are unoccupied and not capable of beneficial occupation by the Appellant. For the foregoing reasons, the Tribunal allows the appeal and

(i) decides that the part of the Property comprising Blocks A, B C and D ought to be excluded from the valuation list of the rating authority area of Dublin City Council
(ii) decides that the remainder of the Property comprising the car park ought to be included in the valuation list of the rating authority area of Dublin City Council and determines the valuation of the car park to be €162,500, and
(iii) amends the description of the remainder of the Property to be entered on the valuation list to Car Park.

And the Tribunal so determines.