

Appeal No. VA07/1/001

AN BINSE LUACHÁLA
VALUATION TRIBUNAL
AN tACHT LUACHÁLA, 2001
VALUATION ACT, 2001

Model Investment Partnership

APPELLANT

and

Commissioner of Valuation

RESPONDENT

RE: Carpark at Lot No. Unit 3, Cúirt na Coiribe, Terryland, Menlough, North County Galway.

B E F O R E

John O'Donnell - Senior Counsel

Chairperson

Brian Larkin - Barrister

Member

Frank O'Donnell - B.Agr.Sc. FIAVI

Member

JUDGMENT OF THE VALUATION TRIBUNAL

ISSUED ON THE 18TH DAY OF JUNE, 2007

By Notice of Appeal dated the 4th day of January, 2007 the appellant appealed against the determination of the Commissioner of Valuation in fixing a rateable valuation of €130.00 on the above described relevant property.

The grounds of Appeal are set out in a letter attached to the Notice of Appeal, a copy of which is attached at the Appendix to this Judgment.

This appeal proceeded by way of an oral hearing held in the offices of the Tribunal, Ormond House, Ormond Quay Upper, Dublin 7 on the 16th day of April, 2007. The Appellant was represented by Ms. Fiona Forde, B.L., instructed by Mr. John Fitzgerald of Messrs Kennedy Fitzgerald Solicitors, The Waterfront, Bridge Street, Galway and by Mr. Michael Gormally of Gormally Auctioneers, Merchants Road, Galway. Mr. Michael Pender, a Partner in the Model Investment Partnership and Ms. Fionnuala Hanlon, Manager of the Cúirt na Coiribe Car Park gave evidence on behalf of the Appellants. The Respondent was represented by Mr. James Devlin, B.L., instructed by the Chief State Solicitor's Office with Mr. Frank O'Connor, ASCS, MIAVI, a District Valuer in the Valuation Office.

The Property Concerned

The property is a basement car park located in the apartment complex known as Cúirt na Coiribe, Headford Road, Galway. The entire complex includes units such as a newsagent, restaurant and launderette in addition to apartments. There is an automatic pay station at the entrance to the car park.

Valuation History

The property was valued at RV €130 at Revision Stage in May, 2006 and was unchanged at First Appeal Stage in December, 2006.

Tenure

The property concerned is a freehold property.

The Issue

The central issue is rateability. The Appellants in their submissions contend that the property falls within the definition of a "domestic premises" pursuant to Schedule 4, Section 6 of the Valuation Act, 2001 and is thus exempt from rateability.

In the alternative it was submitted that the rateable valuation applied was excessive bearing in mind the location and nature of the car park and by reference to comparator car parks in Galway.

The Appellant's Case

Mr. Michael Pender, partner in the Model Investment Partnership, the Appellant, having taken the oath, gave evidence as follows:

In his evidence Mr. Pender provided the Tribunal with background information on the subject property. It is a basement car park in an NUI Galway Student Village consisting of accommodation for 386 3rd level students in 86 self-contained apartments leased from the Kenny Group and was developed in compliance with Section 50 of the Finance Act, 1999 which offered investment tax shelters for such developments. Copies of the Cúirt Na Coiribe brochure and planning permission dated the 2nd November, 2000 were handed into the Tribunal for reference purposes.

Mr. Pender, referring to the brochure, pinpointed the location of the subject property as being situated on a very congested route between the Bodkin and Kirwan roundabouts on the Headford Road, Galway. The Bodkin roundabout which was fitted with traffic lights was an area to be avoided by both morning and evening rush hour commuters. Furthermore, the Dublin road was extremely busy and very difficult to cross. Mr. Pender advised the Tribunal that the student accommodation within the complex was approved by the Department of Education and Science and handed in a Certificate of Compliance to that effect.

Dealing with the car park itself, Mr. Pender indicated that it wasn't attractive to non-residents for the following reasons:

- (1) The difficulty and danger associated with crossing a very busy roadway was a deterrent to those living in nearby apartments, apart from the fact that there is ample on street parking.
- (2) No need for the patrons of the adjacent Dunnes Stores and other large shopping complexes such as the Galway Retail Park and Galway Shopping Centre to use the car park as they had adequate parking facilities themselves.
- (3) The public at large travelling to Galway City Centre for shopping etc. would not park there for the following reasons:
 - a) They may well be unaware of the existence of the subject car park as it was located in the centre of a private development and was not visible from the road.

- b) Even if they were acquainted with the location of Cúirt na Coiribe, they would be disinclined to use it given that Galway city centre was well catered for parking with facilities at Roches Stores, The Dyke Road, and the Cathedral area to name but a few.

Asked by Ms. Forde if the public would make use of the commercial units within the complex, Mr. Pender stated that residents of the adjacent complexes would from time to time use the shop unit, in particular as a convenience store.

Moving on to issues arising out of the Valuation Office response as set out at Paragraph 3 of the Respondent's précis, Mr. Pender stated as follows:

- (1) He accepted that planning permission was not essential for property to be rated.
- (2) There was no planning permission for use as a public car park. It was never intended to be such. The car park facility was only available to the occupiers/visitors of the estate. In other words it was reserved for the student residents and tourists/visitors.
- (3) He categorically denied that 20 spaces were reserved for residents and that the balance of 100 spaces approximately were open to the public for a stipulated charge. (A printout for 2006/7 was handed in by Mr. Pender confirming that 71 students were registered to use the car park.) In response to a question from Ms. Forde as to why it was necessary to have a barrier and pay station in such circumstances Mr. Pender replied as follows:
 - a) to control access.
 - b) for security reasons in general (barriers right around the complex)
 - c) to recover costs, in theory, as there were lighting and maintenance issues with and underground car park.
 - d) for future proofing.

Asked regarding signage and when the "RESIDENTS PARKING ONLY" sign featuring in the report of Mr. Michael Gormally dated 11th April, 2007 was erected, Mr. Pender replied that it was put up in the previous three months but not before the First Appeal stage. Mr. Pender added that the other two signs featuring in the same report on the left hand side of the entrance to the subject car park referred to surface car parking for customers of the commercial facilities.

Arising out of cross-examination by Mr. Devlin, Mr. Pender confirmed that certain services such as the shop unit and launderette were used by both the public and students. He also stated that tourists/visitors would use both the surface and basement car parks but was not fully sure if they paid for use of the latter. Mr. Pender, however, disagreed with Mr. Devlin that there was any sort of policy in place to charge visitors or tourists. Simply because there was no reference in the Brochure at reception to availability of free parking was not indicative of a conscious practice to impose a tariff on visitors or tourists. On the contrary, Mr. Pender argued that there was a buzzer facility in place for visitors/family members and it was only on the rarest of occasions when the reception at the complex was unmanned that visitors might be required to pay. Mr. Pender re-iterated that the existence of the barriers was all part of the futuristic services profile, which incorporated inter alia nightlighting, maintenance, leaves collection, security etc. all of which fell within the concept of future proofing.

Mr. Pender further added that he understood that the long term plan was to levy students for the use of the car park but that there was no intention of opening it up to members of the public at any stage. Apart from anything else, there simply would not be car spaces for the public due to student demand.

Pressed by Mr. Devlin on the contents of the Kennedy Fitzgerald letter dated the 8th December, 2006, Mr. Pender, concluding his cross-examination, assured him that the car park was not used by members of the general public. He accepted that the said letter was not explicit to the extent of differentiating permitted usage under condition 3 of the planning permission and actual usage on the ground. Mr. Pender emphasised that the car park was used by residents and visitors only.

Ms. Fionnuala Hanlon, Manager of the Cúirt na Coiribe Car Park informed the Tribunal that the automatic pay station became operative in December, 2005. She advised that student access/exit was arranged via buzzers issued from reception. Visitors/friends of the students were 'buzzed out' by the car park office and in the event of the office not being staffed assistance was possible from the security office. Ms. Hanlon advised the Tribunal that there was no public interest in the car park other than occasional use by friends of the students, most of whom used the surface car park, adding that only one member of the general public paid to use it at Christmas, 2006.

Referred by Ms. Forde, to Paragraph 2, Page 3 of the Respondent's précis (the Valuation Office response) in which Mr. O'Connor of the Valuation Office stated that on his inspection he was told by her that 20 car spaces were reserved for residents and that the remaining spaces were open to the public, she flatly rejected making such a statement, adding further that there were no spaces reserved for students. 71 students were registered in 2006/7 as users of the car park, Ms. Hanlon stated, and were provided with buzzers for access to and egress from the car park. A copy of the register broken down over student name, car registration and buzzer ID was referred to.

Cross examined by Mr. Devlin on the crux issue that 20 spaces were allegedly reserved for students/residents, Ms. Hanlon, as car park Manager on site, again rejected ever making such a statement to Mr. O'Connor or alternatively that he misunderstood her and confused the basement with surface car parking spaces.

Pressed by Mr. Devlin as to the necessity of a €3 sign at the entrance if the car park was for exclusive student usage, Ms. Hanlon stated that it was to cater for friends of the students on occasions when there was no staff on hand to release them. The total parking fees taken on this basis was insignificant, she said, with some €130 in total collected between December, 2005 and March, 2007, measured on a float system. In response to questions put by the Tribunal Ms. Hanlon stated:

- (1) the shop on site was used as a convenience store by residents of the adjacent residential complexes, who would park on the side of the road or on the surface car park but not in the basement car park.
 - (2) the restaurant was frequented by both students and members of the public.
 - (3) the launderette facility was not used by members of the public.
 - (4) the pay station signs had been removed since Mr. O'Connor's inspection,
- and on recall for clarification Ms. Hanlon advised the Tribunal that a further "Residents Only" car parking sign was in place and that there had been an increase in the number of students registered as car park users at Christmas and examination periods.

Mr. Michael Gormally of Gormally Auctioneers stated that:

- (1) the commercial units (launderette, restaurant etc.) were no draw to the public.
- (2) the Cúirt na Coiribe car park is no draw either to the public for the following reasons:

- (i) the dangers presented for shoppers crossing the dual carriageway between the Bodkin and Kirwan roundabouts.
 - (ii) there was ample surface car parking in adjacent developments.
 - (iii) there were extensive car parking facilities in the vicinity already viz,
 - a) Dunnes Stores, Terryland (across the road) had 482 spaces. Free for first 3 hours.
 - b) Galway Shopping Centre had 727 spaces. Free for first 3 hours.
 - c) Galway Retail Park had 270 spaces. Free for first 2 hours.
 - d) Dyke Road had 474 Spaces. €4 per day.
- (3) the Cúirt na Coiribe car park was no draw for those working or shopping in Eyre Square either. The distance was a factor and there was no Luas or bus service in place.

Overall, Mr. Gormally said that Cúirt na Coiribe car park suffered from poor visibility from the public road due to its location in the middle of a private development. Furthermore he added that the subject car park was viewed by most as a Section 50 student only residential complex.

Moving on to the comparisons, Mr. Gormally told his counsel, Ms. Forde, that J.J. Rhatigan's was the most suitable comparison and confirmed that the number of car spaces in that premises was 61 and not 106 as set out in his précis of the 28th March, 2007 (in line with Mr. O'Connor's précis). This car park was on the main route from Galway city centre to Salthill and was closer to the city centre than the subject. It was constructed beneath a supermarket, shops and private apartments. The first hour's parking was free with a Euro per hour charge being imposed thereafter. J.J. Rhatigan's benefited also from the fact that people were forced into that car park since there was very little surface car parking around. On that basis Mr. Gormally said he rated the subject at 70% pro rata the RV of J.J. Rhatigan's. Mr. Gormally stated that Roches Stores and Woodquay Investments car parks (in Respondents précis) were inappropriate comparisons for reasons of the former's city centre pivotal location and the latter offering private parking. Asked finally by Ms. Forde if he noticed 20 car park spaces had been reserved in the subject car park, Mr. Gormally said he had not.

Cross examined by Mr. Devlin, if he had any idea why Messrs Bagnall & Company, who had acted as agents for the Appellants up to March, 2007, described the RV as fair, he replied that

he could not account for assessments of other agents other than that it was likely to have been their view based on comparisons. Ms. Forde interjected at this point by referring to the attachment to Messrs Kennedy Fitzgerald Solicitors letter of the 8th December, 2006 Paragraph 3 which stated “Notwithstanding the points above we also feel that the level attaching is high bearing in mind the location, etc. of the relevant property and that an excessive amount of spaces have been valued.”

Mr. Devlin put it to Mr. Gormally that there was a discrepancy between times quoted for the walking distance of the subject car park from the city centre on the Cúirt Na Coiribe brochure i.e. 10 minutes, and the advertisement on its website i.e. 7 minutes. This Mr. Gormally put down as a function of a number of factors including route taken, time, etc.

Mr. Devlin also put it to Mr. Gormally that he wanted to distance himself from J.J. Rhatigan given that his devaluation methodology which produced a rate of 72 cent instead of €201.60 was flawed. The 72 cents resulted from a division of the J.J Rhatigan RV (€77) by 106 car spaces instead of 61 and at all events should have been NAV-based. Mr. Gormally stated that that particular calculation was complicated on a number of grounds, adding however that J.J Rhatigan remained the nearest comparator.

Mr. Devlin further put it to Mr. Gormally, a propos the inclusion of Roches Stores as a comparator, that because Roches Stores was approximately 5 times larger than the relevant property there was a substantial element of discount included in its RV. This point was accepted by Mr. Gormally. Mr. Gormally agreed with Mr. Devlin that the reason why the car park was “virtually empty” at the time of his inspection may have been due to the Easter holidays while at the same time reserving his position that it was predominately for the use of students.

Finally Mr. Devlin put it to Mr. Gormally that if he felt that the RV was incorrect he should have inserted an alternative RV at Paragraph 6(a)(ii) of the Notice of Appeal to the Valuation Tribunal.

The Respondent's Case

Mr. Frank O'Connor, District Valuer, adopted his précis and gave evidence on behalf of the Respondent. He stated that on inspection of the relevant property he observed the automatic pay station and the €3 per day sign at the entrance to the basement car park. He confirmed that he met the manager Ms. Hanlon and was given the impression that 20 spaces only were reserved for students. Asked by Mr. Devlin if it was the surface car park he was looking at, he said "no". Asked if he thought there was anything significant about the pay station he said he felt it was commercial in nature and that he had never seen an automatic pay station in a residential block with an associated €3 per day sign.

Mr. O'Connor stated that he deducted the 20 spaces reserved for residents from the 123 car spaces marked and calculated the NAV on that basis at €201.60 per space, arriving at an RV of €130. Asked where he got this figure of €201.60, he replied that this was the rate per space applied in J.J. Rhatigan's in arriving at the NAV. J.J. Rhatigan's was an appropriate comparator he said and while it was quieter than the subject property it had a lot in common with it viz shops, supermarket, apartments, etc.

Cross examined by Ms. Forde, he agreed that the apartments were Section 50 student accommodation, that there were 86 apartments and that there were 386 students resident there. Mr. O'Connor disagreed however that all the spaces were used by students. He contended that the car park was a viable option for the overspill of shoppers from the adjacent Retail Parks plus visitors to N.U.I.G. Put to him if Dyke Road car park wasn't a better option than the subject car park Mr. O'Connor felt that there was very little in the difference timewise.

Mr. O'Connor agreed with Ms. Forde that the public were unlikely to park in Cúirt Na Coiribe. He reiterated however that he was in no doubt that Ms. Hanlon said 20 spaces only were reserved for students. However Ms. Forde put it to him that this clearly could not have been the case and that it was a misunderstanding on someone's part. She put it to him that it was not viable to reserve 20 spaces only for the use of 71 students of which evidence had been presented to the Valuation Tribunal were registered to use the car park.

When put to Mr. O'Connor that Mr. Gormally had given evidence to the effect that the automatic pay station was installed for future proofing and should not have been rated, Mr O'Connor stated that "he had to take things as they stand on the day".

On the subject of comparisons Mr. O'Connor agreed that J.J. Rhatigan's was more apt than Roche's Stores and Woodquay Investments car parks. When attempting to value the subject car park Mr. O'Connor said that he tried to balance J.J. Rhatigan's superior tenant mix and its quieter location relative to Cúirt Na Coiribe. When put to him that there was no comparison between the anchor tenants in J.J. Rhatigan's and the location of J.J. Rhatigan's vis-à-vis subject premises, Mr. O'Connor disagreed, adding further that Cúirt Na Coiribe was well located quoting distance relative to J.J. Rhatigan's from Jury's as a yard stick.

Appellant's Submissions

On behalf of the Appellant, Ms. Forde contended that the presence of the automatic pay station should be viewed in the context of Mr. Pender's evidence that it was installed for future proofing. Those registered to use the car park on the evidence provided were students (some 71 in all in 2006/7) and were furnished with buzzers for entry and exit. Tariffs collected outside of that system were negligible, (some €130 in all since the machine was installed) and were due to the office being unmanned.

Ms. Forde submitted that against that background it was clear that the car spaces should be deemed as being appurtenant to and usually enjoyed with the apartments of the complex and as such fell within the remit of Section 3(4) of the Valuation Act, 2001 as "domestic premises". She added that the evidence before the Tribunal demonstrated clearly that the use by the public of the relevant property was so insignificant as to rule out any suggestion that it was a "mixed premises" and thus not qualify as a "domestic premises".

Alternatively Ms. Forde submitted that if the Tribunal was not satisfied that the subject car park qualified for exempt status that the RV of €130.00 was excessive in comparison with J.J. Rhatigan's which was more attractive and should be reduced pro rata.

Respondent's Submissions

Mr. Devlin on behalf of the Respondent contended that the essential evidence was that on Mr. O'Connor's inspection in 2006 there was a € parking sign displayed at the entrance to the basement car park. There was no evidence on that sign he said to suggest that parking was restricted to residents/students only. This he said was an elaborate ticket machine for collecting tariffs (€) from anyone willing to pay. Mr. Devlin was sceptical of Mr. Pender's explanation that the machine was installed as part of a future proofing policy. He suggested that while the takings on the machine were not significant at the moment, a hypothetical tenant would factor it in if considering leasing the property.

While accepting that a domestic hereditament was not rateable, Mr. Devlin contended that a car park was not per se "domestic" and a fortiori the presence of an automatic pay station fuelled the "non-domestic" argument if seeking exemption under Schedule 4, Section 6 of the 2001 Act. Mr. Devlin further contended that such a scenario coupled with the conflicting evidence of Mr. Frank O'Connor and Ms. Hanlon regarding the 20 'allegedly' reserved spaces presented a difficulty for the Tribunal. Mr. Devlin concluded by arguing that if the Tribunal found on the facts that over a hundred car spaces were not used in conjunction with any of the apartments and there was provision for a charge to be made, it was submitted that this property fell outside the exemption available under Section 3(4)(b) of the Act and/or did not qualify for exemption on the basis that it was a mixed premises.

The Law

Schedule 4, Section 6 of the Valuation Act, 2001 states that any domestic premises are exempt from rates (subject to Section 59(4) which provides that apartments are rateable in certain limited circumstances.)

Section 3 of the Valuation Act, 2001 defines a "domestic premises" as -

"any property which consists wholly or partly of premises used as a dwelling and which is neither a mixed premises nor an apart-hotel".

Section 3(4) of the 2001 Act provides that -

"for the purpose of this Act a property shall not be regarded as being other than a domestic premises by reason only of the fact that -

(b) the property is partly comprised of a yard, outoffice, or appurtenance, garden or other land usually enjoyed with the relevant dwelling.”

Section 3 further defines a “mixed premises” as -

“a property which consists wholly or partly of a building which is used partly as a dwelling to a significant extent and partly for another or other purpose to such an extent”.

Case Law (advanced by the Appellants)

The definition of “domestic hereditaments” within the meaning of the Local Government (Financial Provisions) Act, 1978, was tested in the Irish Courts (albeit pre Valuation Act, 2001) in the case of **Kerry County Council v Kerins [IR3 1996]**. The Appeal to the Supreme Court referred to the letting of 12 chalets for a two week period during the tourist season and whether such a short term letting disentitled the lessors, **Kerins**, from the benefit of exemption equivalent of the later Schedule 4, Section 6 of the Valuation Act, 2001.

In the course of his judgment, Hamilton, C.J. stated as follows:

“It is quite true that the rated occupier does not occupy them as a dwelling for himself and his family; he used them for commercial purpose of letting them out to other people who would reside in them for short periods during vacation and use them as their dwelling for those particular periods but the actual fact is that these chalets can only be described as dwellings and the definition does not require that it cannot be used for commercial use in the sense of being let out for dwellings during the holiday period and I am satisfied that these dwellings come within the definition of a domestic hereditament.”

Findings

The Tribunal carefully considered all the factual evidence and legal argument adduced on behalf of the parties and makes the following findings:

- (1) The subject car park is located in the basement of an apartment complex known as Cúirt Na Coiribe, off the Headford Road, Galway and is also described as an N.U.I.G Student Village, within the ambit of Section 50 of the Finance Act, 1999.
- (2) The apartment complex housing the relevant basement car park operates within the terms of the Finance Act, 1999 and provides living accommodation for 386 3rd level

students in 86 self contained apartments pursuant to the guidelines of student residential development issued by the Department of Education and Science.

- (3) In confirmation of its status as qualifying Residential Accommodation for third level students, a Certificate of Compliance from the Department of the Environment, Heritage and Local Government was made available to the Tribunal.
- (4) The apartment complex also houses a small number of convenience commercial units such as a newsagents shop, launderette and restaurant.
- (5) The subject car park was reserved for the student residents of the Cúirt Na Coiribe complex and there was no evidence of any significant use by the general public, whether due to access, visibility, perception, ample alternative, or other factors.
- (6) There was no Planning Permission for use of the car park by the general public in Permission dated 2nd November, 2000 and while accepting that such was not a prerequisite for rateability, the de facto reality on the ground was that there was no evidence of any significant public usage.
- (7) Regarding the issues raised in Paragraph 2, Page 3 of the Respondent's précis the Tribunal finds as follows:
 - a) On the balance of probabilities, the suggestion that 100 car spaces plus were open to the public with the remaining 20 spaces only reserved for students was not supported by the facts.
 - b) It is satisfied that the intensive usage by residents/students as reflected in the 2006/7 register is only suggestive of one interpretation i.e. predominant if not total resident/student usage.
 - c) That the barrier/pay station installation and associated signage was a prior step of a future proofing strategy with integrated linkage of access, security and overall control. It was not indicative of a car park facility open to the public at large and operated for commercial gain. Neither was there a definitive plan to charge visitors or tourists.
- (8) J.J. Rhatigan's car park, a common comparator is the most apt parallel.
- (9) The car spaces are appurtenant to the apartments and for the enjoyment of the residents therein to all intents and purposes and thus qualifying as "domestic premises" within the meaning of Section 3(4) of the Valuation Act, 2001.
- (10) There was insufficient evidence to conclude that the premises was a "mixed premises".

Determination

The Tribunal, having regard to the foregoing, is satisfied that the subject basement car park falls within the definition of “domestic premises” pursuant to Section 3(4) of the Valuation Act, 2001 and is entitled to exempt status from rates under Schedule 4, Section 6 of the Valuation Act, 2001. Quantum consequently is not an issue.

And the Tribunal so determines.