

**Appeal No: VA14/5/669**

**AN BINSE LUACHÁLA  
VALUATION TRIBUNAL**

**AN tACHT LUACHÁLA, 2001  
VALUATION ACT, 2001**

**FINNEGAN MENTON LTD**

**APPELLANT**

**AND**

**COMMISSIONER OF VALUATION**

**RESPONDENT**

**In relation to the valuation of**

Property No. 840743, Retail (Shops) at 17 Merrion Row, County Borough of Dublin.

**B E F O R E**

**John Stewart - FSCSI FRICS MCI Arb**

**Deputy Chairperson**

**Dairine Mac Fadden - Solicitor**

**Member**

**Caroline Murphy -BL**

**Member**

**JUDGMENT OF THE VALUATION TRIBUNAL**

**ISSUED ON THE 31<sup>ST</sup> DAY OF JULY, 2019.**

**1. THE APPEAL**

1.1 By Notice of Appeal received on the 4th day of September 2014 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value ‘(the NAV)’ of the above relevant Property was fixed in the sum of €60,700.

1.2 The Grounds of Appeal are fully set out in the Notice of Appeal. They are as follows:

*The property is incorrectly listed in the Category of ‘Retail (Shops)’. The property should be valued under the category ‘Offices’ and the Use should be listed as ‘Offices (Georgian Victorian)’.*

*The property is (and has for the last number of decades) been in Office use. The office is a firm of Chartered Surveyors and Estate Agents but unlike many Estate Agents does not even display properties in the window or reception area. The Ground Floor has been valued by the Valuation Office on a Retail Zone A, B and C basis while it should be valued as Offices (Georgian / Victorian).*

*The property could not be put to retail use without planning permission for the change of use. The window frontage does not lend itself to retail use and as a Protected Structure it would most likely not be permitted to replace the ground floor windows with a shop front.*

*Section 48(3) of the Valuation Act 2011 states that the Basis of Valuation of a property is [sic] the net annual value in relation to the property "in its actual state". Therefore, the valuation should be valued in its current state and not valued on an assumption of another alternative use for which planning permission would be required and material alterations would be required.*

*In arriving at their opinion of NAV the Valuation Office should have regard to valuations assessed on properties in the same use (Estate Agents & Auctioneers and similar office uses with public ground floor access) including properties that are under different categories ie [sic] Offices (2<sup>nd</sup> gen), Office (Georgian [sic] / Victorian) and Offices (3<sup>rd</sup> Generation) which are being put to the same use and are in the same locality.*

*The valuation is considered excessive and inequitable.*

1.3 The Appellant considers that the valuation of the Property ought to have been determined in the sum of €37,500.

## **2. REVALUATION HISTORY**

2.1 A copy of a valuation certificate proposed to be issued under section 24(1) of the Valuation Act 2001 ("the Act") in relation to the Property was sent to the Appellant indicating a valuation of €60,700.

2.2 Being dissatisfied with the valuation proposed, representations were made to the valuation manager in relation to the valuation. Following consideration of those representations, the valuation manager did not consider it appropriate to provide for a lower valuation.

2.3 A Final Valuation Certificate issued on the 8th day of August 2014 stating a valuation of €60,700.

2.4 The date by reference to which the value of the property, the subject of this appeal, was determined is the 07 day of April 2011.

### **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 9th day of April 2019. At the hearing Mr. Owen Hickey SC and Mr. Barry O'Donoghue BL, instructed by Ferrys Solicitors, represented the Appellant and the Tribunal heard evidence from Mr Nicholas Corson, Director Finnegan Menton, Mr David McHugh Conservation Architect, and Mr Donal O'Donoghue, Valuer OMK Property Advisors, on behalf of the Appellant. The Respondent was represented by Mr. David Dodd BL, instructed by the Chief State Solicitor, and Ms Mary Conway, Deputy City Planner, Dublin City Council, Mr Pat Nestor Head of Building Control Division, Dublin City Council and Ms. Claire Callan Valuer BCS (Surv), gave evidence on behalf of the Valuation Office.

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

### **4. FACTS**

4.1 From the evidence adduced by the parties, the Tribunal finds the following:

4.2 The Property is a four storey over basement mid terrace property situated at 17 Merrion Row, Dublin 2, with a single storey flat roof link building over a former yard, connecting through to the original two storey mews/coach house. It is located in a parade of retail/restaurant premises. The ground floor consists of an open plan area with a side entrance door and includes two timber framed display windows. The basement comprises storage accommodation and upper levels on first, second and third floors are used as offices. There is one door at the front through which the entire property is accessed. It is not in dispute that the

first, second and third floor are in use as offices and valued as such by the Respondent. It is accepted that the basement is used for storage. Access between the ground floor and basement is through an internal staircase and access between the ground floor and the upper floors is also by means of an internal staircase. The Property is a protected structure.

The valuers have agreed the floor areas:

Floor	Area M <sup>2</sup>
Ground floor	84.26
1st floor	75.97
2 <sup>nd</sup> floor	40.79
3 <sup>rd</sup> floor	40.79
Basement	39.59

The ground floor zoning areas were not contested and have been accepted by the Tribunal.

Ground floor Zoning	Area M <sup>2</sup>
Zone A	28.78
Zone B	12.01
Zone C	43.47

## 5. RELEVANT STATUTORY PROVISIONS:

5.1 The net annual value of the Property has to be determined in accordance with the provisions of section 48 (1) of the Act which provides as follows:

“The value of a relevant property shall be determined under this Act by estimating the net annual value of the property and the amount so estimated to be the net annual value of the property shall, accordingly, be its value.”

5.2 Section 48(3) of the Act provides for the factors to be taken into account in calculating the net annual value:

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 expected to let from year to year, on the assumption that the probable average

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 and charges (if any) payable by or under any enactment in respect of the property, are borne by the tenant.

## **6. ISSUES**

6.1 The issue which arises for determination in this case is whether the Respondent in applying the zoning method of valuation for retail shops to the ground floor of the subject property, did in fact estimate the net annual value of the Property in its actual state". The Appellant contends that the ground floor is an office and that it was not valued "in its actual state".

## **7. APPELLANT'S CASE**

7.1 Mr Nicholas Corson, Director of the Appellant company, said the Property was an office for the use of Chartered Surveyors/ Estate Agents and was not for members of the public. The majority of the business was done by phone or by email, with very few walk-in visitors. Visitor appointments were usually made by prior arrangement and walk-ins were not encouraged. There is a reception desk at the front, close to the front door and there are three desks and a waiting area. At the back of the ground floor, there is an open plan area in office use. The Appellant does not advertise/display properties in the windows at the front. The Appellant is in sole occupation of the entire building.

7.2 Under cross-examination, Mr Corson confirmed that there has been continuous use of the Property as estate agents since 1888; that the outer main door was opened every morning and there is no step at the entrance. He confirmed that properties were advertised for sale on the Appellant's website.

7.3 Mr David Mc Hugh said that he was an Architect with a qualification also in Conservation Architecture and a Masters in Project Management. The scope of his instructions was to carry out a superficial visual inspection of the Property and to carry out a desktop analysis of secondary source material available, to establish the use history and to review and advise on any statutory consent implications arising in the event of a change of use or partial change of use of the Property from what he said was its present established use as offices, to shop on the ground floor and offices on the upper floors.

7.4 The Property was continuously occupied as offices from 1888 to 1967 by James Adam & Son Ltd, Estate Agents and Valuers and from 1968 to date by the Appellant.

7.5 The Property is in Zone Z.5 “*To consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity*”. It is not within the City Centre Retail Core – Principal Shopping Streets area, as defined in the Development Plan. It is included in the Register of Protected Structures listed in the Development Plan.

7.6 He referred to Article 10 of the Planning and Development Regulations 2001 ( “the Planning Regulations”) which provide that development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2 is exempted development provided that the development if carried out would not involve the carrying out of any works other than works which were exempted development. He is of the opinion that it is not feasible to change the use of the ground floor to a shop, without at the same time carrying out essential and necessary material alteration works to the building to comply with the other statutory consents (Fire Safety Certificate and Disability Access Certificate), which he says must be obtained to give effect to such a change of use. Therefore, he says it is clear that Article 10 of the Planning Regulations cannot apply in this case. Further, he said it is clear that such a change of use would require a prior grant of planning permission because, even if it were determined that the change of use *per se* could fall within the scope of Article 10 of the Planning Regulations, the exemptions provided for therein do not apply to protected structures which the Property is. Therefore, it is not possible to change the use of the ground floor of the Property to a shop without a prior grant of Planning Permission. Works that require Planning Permission also require, as a matter of course, a Fire Safety Certificate and a Disability Access Certificate, and are required to comply with the Building Regulations, and fall within the ambit of the Building Control Amendment Regulations and the Health, Safety and Welfare at Work (Construction) Regulations. Whilst no scope of works attendant on a change of use had been developed, he had no doubt based on his long experience, that the scope of such works would involve alterations to structure, plumbed and wired services and finishes and would be very difficult to procure from a statutory consents point of view.

7.7 He stated that the Property had a single set of stairs. This would mean that one would be exiting from the basement into a shop and this would not be permitted. Mr Dodd on behalf of

the Respondent objected at this point stating that this was not in Mr Mc Hugh's précis and that he might require time to consider this point. Mr Mc Hugh in response said that his net point was that a change of use to a shop would require far reaching works such as a new fire alarm, compartmentalisation, works to ceilings and floors, protected corridors and lobbies.

7.8 Under cross-examination by Mr Dodd, Mr Mc Hugh accepted that the current use was within Class 2 (b) of Part 4 of Schedule 2 of the Planning Regulations. He also agreed that as regards the planning classification, there was no use described as retail with the description being "shop. The Property was clearly not a shop within the meaning of the Planning Regulations and the question of change of use was irrelevant as it was the requirement of the additional works which would give rise to the necessity to obtain Planning Permission. He had no issue with the contents of Mr Nestor's report on behalf of the Respondent and thought that he and Mr Nestor were in agreement that Fire Safety and Disability Access Certificates would be required. He was not holding himself out as an expert in planning but was giving his opinion as a Conservation Architect. He accepted that as there was an established use since the 1<sup>st</sup> of October 1964, planning permission was not needed for the current use and that the issue of statutory consents would only arise if there were material alterations or a material change of use. It was put to him that Mr Nestor, Building Control Division of Dublin City Council, would say that a large number of applications for Fire Safety and Disability Access Certificates were successfully dealt with by Dublin City Council Building Control Authority each year and he said that he was aware of this. As regards fire alarms, he said that the Property currently had a single use fire alarm and that if the ground floor was in use as a shop, zoning would be required. His understanding was that protected lobbies would also be required because of the single staircase. Mr. Dodd put it to him that issues of practicability were often engaged by Dublin City Council when considering Building Regulation requirements for protected structures. At this point Mr Hickey objected on the grounds this was not in Mr. Nestor's report which they received the previous day. Mr Dodd then put it to Mr Mc Hugh that it was he who had had raised the issues of difficulties attendant upon compartmentalisation, dividing floors and protecting ceilings but that there could be an alternative option to fireproof ceilings by working from above the ceilings and lifting floorboards and putting in the fire resisting material above the ceilings in this way. Mr Mc Hugh said that while this could be done, it would require taking up the entire floor and that this was not minimal disruption.

7.9 Under re-examination by Mr Hickey, he confirmed that all the works which had been put to him by Mr Dodd as alternative solutions would still require Planning Permission.

7.10 Mr Donal O'Donoghue, a Valuation Surveyor with 25 years' experience in the practice of property and rating valuations, said that as a matter of fact the Property was an office and that it must be valued as such and not for potential retail occupation. The zoning method was appropriate for valuing retail units but not for the Property. The Property was held on a related parties lease basis. The floor areas were agreed. He assessed the valuation by reference to the emerging tone of the list for offices located in the Dublin City Council area. In his opinion the ground floor area of the Property should be rated at €160m<sup>2</sup>. In arriving at this opinion, he had regard to section 48 of the Act and the principle of "*rebus sic stantibus*". He valued the Property as used i.e. as an office. The redacted schedule of comparisons is set out below and full details are contained in Appendix 1. He also had regard to the emerging tone of the list for Georgian/Victorian office premises as follows:

7.11 NAV 1, on Molesworth Street, which he described as 3<sup>rd</sup> generation/ Georgian/Victorian offices occupied by a firm of Chartered Surveyors and which were valued on the basis of €240m<sup>2</sup> for the 3<sup>rd</sup> generation offices on the ground floor and €160m<sup>2</sup> for the Georgian/Victorian offices on the ground floor. The use was the same as that of the Property and it is inconsistent that the Property is not valued in line with these comparable premises. The NAV was €584,000.

NAV 1 was valued as follows:

Third Generation Accommodation

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor offices	647.98M <sup>2</sup>	@	€240/ M <sup>2</sup>	€155,515.20
Basement offices	284.76 M <sup>2</sup>	@	€240/ M <sup>2</sup>	€68,342.40
1 <sup>st</sup> floor offices	605.91 M <sup>2</sup>	@	€240/ M <sup>2</sup>	€145, 418.40
2 <sup>nd</sup> floor offices	607.51 M <sup>2</sup>	@	€240/ M <sup>2</sup>	€145,802.40

Georgian/Victorian Accommodation

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor offices	90.26 M <sup>2</sup>	@	€160/ M <sup>2</sup>	€14,441.60
Basement offices	24.00 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€2,880.00



1st floor offices	86.07 M <sup>2</sup>	@	€140/ M <sup>2</sup>	€12,049.80
2nd floor offices	86.97 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€10,436.40
3 <sup>rd</sup> floor offices	93.14 M <sup>2</sup>	@	€100/ M <sup>2</sup>	€9,314.00
Car spaces	8	@	€2,500	€20,000
			Total	€584,200.20 Say €584,000.00

7.12 NAV 2, on Kildare Street, which he described as Georgian/Victorian offices, and which were valued on the basis of €160m<sup>2</sup> for the offices on the ground floor. The ground floor is in use as a gallery and valued as offices. It is inconsistent that the Property is not valued in line with these comparable premises. The NAV was €53,600.

NAV 2 was valued as follows:

Georgian/Victorian Accommodation

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor offices	75.00 M <sup>2</sup>	@	€160/ M <sup>2</sup>	€12,000.00
Basement store	75.00 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€9,000.00
1st floor offices	75.00 M <sup>2</sup>	@	€140/ M <sup>2</sup>	€10,500.00
2nd floor offices	75.00 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€9,000.00
3 <sup>rd</sup> floor store	86.90 M <sup>2</sup>	@	€100/ M <sup>2</sup>	€8,690.00
Car spaces	3	@	€1,500	€4,500.00
			Total	€53,690.00 Say €53,600.00

7.13 NAV 3, on Lower Baggot Street, which he described as Georgian/Victorian offices occupied by Chartered Surveyors and which were valued on the basis of €160m<sup>2</sup> for the offices on the ground floor. This property is located within easy walking distance of the Property and the use is the same and comparable. It is inconsistent that the Property is not valued in line with these comparable premises. The NAV was €181,700.

NAV 3 was valued as follows:

Georgian/Victorian Accommodation

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor offices	263.87 M <sup>2</sup>	@	€160/ M <sup>2</sup>	€42,219.20

Basement office	299 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€35,880.00
1st floor offices	255.58M <sup>2</sup>	@	€140/ M <sup>2</sup>	€35,781.200
2nd floor offices	244.29 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€29,314.800
3 <sup>rd</sup> floor office	265.27 M <sup>2</sup>	@	€100/ M <sup>2</sup>	€26,527.00
Car spaces	8	@	€1,500	€12,000
			Total	€181,722.20 Say €181,700

7.14 NAV 4, on Molesworth Street, which he described as 2<sup>nd</sup> generation offices, occupied by Chartered Surveyors and which were valued on the basis of €180m<sup>2</sup> for the offices on the ground floor. The use was the same and comparable. It is inconsistent that the Property is not valued in line with this comparable premises. The NAV was €196,900.

NAV 4 was valued as follows:

#### 2<sup>nd</sup> Generation Office Accommodation

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor offices	789.30 M <sup>2</sup>	@	€180/ M <sup>2</sup>	€142,074.00
Basement stores	26.47 M <sup>2</sup>	@	€90/ M <sup>2</sup>	€2,382.30
21 cars		@	€2,500	€52,500.00
			Total	€196,956.30 Say €196,900.00

7.15 NAV 5, on St. Stephen's Green, which he described as 2<sup>nd</sup> generation offices, occupied by Chartered Surveyors and which were valued on the basis of €180m<sup>2</sup> for the offices on the ground floor. This property was located very near to the Property and at the valuation date was in the same use as the Property. It is inconsistent that the Property is not valued in line with these comparable premises The NAV was €134,800.

NAV 5 was valued as follows:

#### 2<sup>nd</sup> Generation Accommodation

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
-------	---------------------	---	------------------------	-------

Ground floor offices	96.71 M <sup>2</sup>	@	€180/ M <sup>2</sup>	€17,407.80
1 <sup>st</sup> floor office	137.03 M <sup>2</sup>	@	€180/ M <sup>2</sup>	€24,665.40
2nd floor offices	137.03 M <sup>2</sup>	@	€180/ M <sup>2</sup>	€24,665.40
3rd floor offices	137.03 M <sup>2</sup>	@	€180/ M <sup>2</sup>	€24,665.40
4th floor office	137.03 M <sup>2</sup>	@	€180/ M <sup>2</sup>	€24,665.40
5 <sup>th</sup> floor office	48.77 M <sup>2</sup>	@	€180/ M <sup>2</sup>	€8,778.60
Car spaces	4		€2,500	€10,000.00
			Total	€134,848.00
				Say €134,800.00

7.16 He disagreed with the suggestion that the Property had a retail façade. He did not believe that the Respondent's key rental transactions were comparable. In particular KRT 1 on Lower Baggot Street had food usage, unlike the Property which was an office; KRT 2 on Lower Baggot Street was a retail pharmacy and had no offices; KRT 3 also on Lower Baggot Street was a ground floor premises with no offices and in use as a café; KRT 4 on Merrion Street was in use as a café, it had no upper floors and was of no relevance; KRT 5 on Merrion Row was a restaurant and as premiums were paid for restaurants, he did not think that rents for restaurants should be used when valuing offices.

7.17 Regarding the NAV comparisons put forward by the Respondent, NAV 1 on Molesworth Street was a high profile Art Auctioneers which was very much a public office with Art on display on the ground floor; NAV 2 on Andrew Street unlike the Property was not a protected structure; NAV 3 on Trinity Street was a traditional estate agents, not on the list of protected structures and has two separate valuation reports. NAV 4 on St. Stephen's Green comprised auction rooms, with a double fronted façade with windows displaying goods coming up for auction and auctions were held on those premises; NAV 5 on Kildare Street was an Art dealer's premises where auctions were held also. NAV 6 on Merrion Row was a restaurant and had no upper floor accommodation, was not an office and not a useful comparison; NAV 7 also on Merrion Row comprised a ground floor shop with no upper floor accommodation- it was not an office and was not comparable; NAV 8 on Lower Baggot Street was also a ground floor shop with a small basement and was in use as a restaurant and was not comparable. He said that it had long been established in rating practice that you must value a property as it is. To

value otherwise would be a departure from valuation practice. A change to use as a shop would require not just minor works – major works would be required.

7.18 On cross-examination he accepted that the onus of proof was on the Appellant. When it was put to him that the Property was in a location having the character of a retail parade, he said that it was not a traditional retail parade as there were also pubs in the vicinity and they would be rated as licensed premises. He described the location as a Georgian/Victorian street. He agreed that there were two large windows on the ground floor and did not disagree when it was put to him that they were display windows but added that they had fanlights and the company name was displayed. He accepted that his comparisons were not market evidence but emerging tone of the list. His understanding of the principle of “*rebus sic stantibus*” was that regard should be had also to potential but that the property must be valued as it is and that is the principal informer. Offices of Chartered Surveyors, Valuers, Estate Agents all have a tone for offices, not a tone for Chartered Surveyors, Valuers, Estate Agents. He accepted that KRT 1 was proximate to the Property; that KRT 2 also provided professional services as a pharmacy. He did not believe that the façade of a property should determine its use or valuation but did accept that profile was important. He accepted that there was no evidence in his précis of a premium being paid for food outlets. As regards his NAV comparisons: NAV 1, he accepted that this was a 3<sup>rd</sup> generation large open plan office, with raised floors for cabling, higher ceiling, lifts, a/c and 5 bays of windows as opposed to 2 in the Property. He did not accept that it was in a parade predominantly in office use and said that there were a number of Art Galleries along that street. As regards NAV 2, he agreed that there were 2 steps leading up to the front door and that the property did not directly about the street. It was put to him that in the photograph of the property which he had submitted, the door was shown as closed but he said that was taken on a Saturday and that typically the door would be open. In relation to NAV 3, he accepted that it had steps leading up to the front door and that the property was set back from the street. Regarding NAV 4, he accepted that it was a purpose build 2<sup>nd</sup> generation office. As regards NAV 5 he also accepted that this was a 2<sup>nd</sup> generation office. It was put to him that none of his comparisons were on Merrion Row or Baggot Street, but he said that NAV 3 was on Lower Baggot Street.

## **8. RESPONDENT’S CASE**

8.1 Ms. Mary Conway, Deputy City Planner / Head of Development Management in Planning and Property Development, of Dublin City Council, gave evidence on behalf of the

Respondent. She said she had looked at the planning history of the Property which is common case between the parties. Ms. Conway said she researched the planning history using Thom's Street Directory. She said the Property has been in continuous use as an auctioneers / estate agents since prior to the commencement of the Planning and Development Act 1963 with it being previously owned by James Adam & Son Ltd. Ms. Conway said the Property was zoned Z5: *"To consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity"*.

8.2 Ms. Conway confirmed that the Property had been in use as an auctioneers and estate agents for many years and that it was an authorised use. She stated that in her opinion the established use falls within Class 2 (b) of the Planning Regulations and she described Class 2 (b) as "Use for the provision of –

- (a) Financial services (other than health or medical services)
- (b) Professional Services
- (c) Any other services (including use as a betting office, Where the services are provided principally to visiting members of the public."

She described Class 1 for use as a shop, Class 2 is for use for professional services and any office service including betting offices, financial services, bank, credit union, building society which would have offices or consultation rooms and, Class 3, is use as an office other than Class 2. She said you can have ground floor as Class 2 and upper floors as Class 3. She said visiting members of the public can visit by arrangement, by phone call, or drop in. She said that members of the public come in by arrangement and so the Property is Class 2 (b).

8.3 In cross examination, Mr. Hickey put it to Ms Conway that evidence had been given by the Appellant that the Property isn't principally open to members of the public and services are not provided principally to members of the public but that it happens from time to time. Ms. Conway said they do come in by arrangement. Mr. Hickey said evidence was given that they come in from time to time to which Ms. Conway replied that it doesn't really matter as it is open for visitors. She said Class 3 by comparison doesn't have visitors as you don't drop in or make inquiries or seek advice. Mr. Hickey put it to Ms. Conway that was not the nearest fit. In reply, Ms. Conway said the conditions are met. She was asked whether she was disagreeing with Mr. Corson's evidence and she said she agreed it was not a shop. Mr. Hickey said that's

the Respondent's case. Ms. Conway said it is not a shop and doesn't fall within the definition of a shop, but it does fall within the definition of Class 2 (b).

8.4 Mr. Hickey said the Appellant would require planning permission for a shop and that the Appellant's case is that planning permission and other statutory conditions would have to be met. In reply, Ms. Conway said why would they seek planning permission to change since the use is authorised and is defined as Class 2. Mr. Hickey put it to her that the property had been valued as if it were a shop and it is not a shop and that her evidence is that it is not a shop. Ms. Conway said she didn't disagree that it would need planning permission for a shop.

8.5 Mr. Pat Nestor, Head of the Building Control Division of Dublin City Council gave evidence on behalf of the Respondent. Mr. Nestor said the requirements of Building Control are not retrospective and do not apply to existing buildings which are not undergoing material alterations, or a material change of use. He said there were some differences between building control and building regulations.

8.6 Mr. Nestor was asked about fire safety in a protected structure if there was a change of use. He said that where there is a change of use it would be necessary to fit fire alarms, smoke detectors, separation of one space from another for fire resistance and the possibility of lining ceiling with fire resistant material in the property. He said he did not know the price of detectors and alarms. He said the separation level of fire resistance was to allow escape. He said ceilings can be highly decorative, but such works may be carried out from above by lifting floorboards and fire resisting material could go above the floorboards. Mr. Dodd asked Mr. Nestor about practicability of achieving this under the building regulations as it may not be appropriate. Mr. Hickey said this was not in Mr. Nestor's report of which they received the previous day. The Tribunal held that Mr. McHugh had given evidence on three areas arising from his report and it appeared fair to allow Mr. Nestor to reply to those areas.

8.7 Mr. Nestor referred to the stairwell. At this point, Mr. Hickey advised that he wanted an adjournment to allow him to arrange for a witness to attend and give evidence on the issues Mr. Nestor was raising, as Mr. Dodd had indicated he would be making a submission at the end of the case that Mr. McHugh's evidence should be deemed inadmissible. The Tribunal was required to rise at this point to consider this application. The Tribunal advised that the hearing would proceed noting that Mr. McHugh's report on behalf of the Appellant was received 2

days after the précis were due to be received by the Tribunal and at the outset of the hearing the parties agreed they would accept the late précis of evidence and allow the late submission of Ms Conway and Mr. Nestor. There was also agreement that Mr. Corson be permitted to give evidence without a précis of evidence being submitted. Mr. McHugh gave evidence and on three areas not included in his précis and the Appellant concluded their evidence. For these reasons, the hearing resumed with the direct examination of Mr. Nestor, the Respondent's second witness.

8.8 Mr. Nestor said in the application submitted to his office a technical report would outline works proposed and the layout of the building and distance to travel to a protected space. He said these are in high demand and there is a large amount of such projects. He said it is not easy and there is a high degree of work required to make the application, but it is highly possible to procure consents from a statutory point of view.

8.9 During Cross Examination, Mr. Nestor said he had not inspected the Property. Mr. Hickey asked Mr. Nestor what his evidence was based on having not inspected the Property. Mr. Nestor said it is based on the general style or type of building. Mr. Hickey put it to him that he was not in a position to comment on the fireproof corridor. Mr. Nestor answered that he was not with regards to this building, but such applications come into his office through the application process. Mr. Hickey put it to him that the process would be very difficult according to Mr. McHugh. Mr. Nestor said the process is not easy and a sophisticated and high degree of knowledge is required. He said in relation to practicality that there may be valuable architectural features and there may be an alternative means of achieving same. He said it was skilled work, commanding a higher wage, and that there is a large amount of such projects underway, but they require a lot of technical skill to make the design and application.

8.10 Mr. Nestor said he largely didn't disagree with Mr. McHugh's evidence, but he disagreed with the over-simplification of planning control. He clarified that applications were largely successful. He said the difficulty to procure the required statutory consents of Fire Safety Certificate or Disability Access Certificate for works to a protected structure are highly speculative and said that was why there were experts in this field. When asked how long the process to procure statutory consents takes, Mr. Nestor said speculating that the level of work is relatively small it would take 2 months to procure consent and if there were a number of works required, the execution of those works would take a matter of months.

8.11 Mr. Nestor said a building under different tenancies would require different means of escape, with complicated regulations changing all the time. He said dealing with older buildings where the inner fabric and level of construction down through the years was not known would require consultation with a Conservation Officer striking a balance between positive aspects of accessibility and negative impact on appearance. Mr. Nestor said certain works would be excluded altogether. He said it would be unusual for a proposal not to go ahead. Mr. Hickey asked Mr. Nestor whether a Fire Safety Certificate and Disability Access Certificate would be required in a material change of use from office to shop. Mr. Nestor said the current use is established. He said a Fire Cert and Disability Access Certificate would be required, which Mr. Dodd interjected to say there had been no evidence led on this. Mr. Nestor clarified that a certificate was only necessary if works were required.

8.12 Ms. Claire Callan, BSC (Surv) of the Valuation Office gave evidence on behalf of the Respondent. Ms. Callan said in her direct evidence that her assessment of the frontage of the Property was of a door to the left-hand side with a window suitable for display, which traditionally would have a display but that this operator has chosen not to have one. She said rental evidence was collected around the valuation date and that this basket of rents is market evidence. She said it is not a revision and so it is not comparable to properties on the list. She said she looked at properties within 500 metres of the Property. She said if you widen your net, different streets have different levels with the highest rental levels on Grafton Street and this scales back.

8.13 Ms. Callan introduced 5 key rental transactions and eight NAV comparisons as set out in Appendix 2 and the redacted schedule is set out below. She said a rate of €900/M<sup>2</sup> had been applied which was consistent with uniformity.

Respondents Comparisons-Key Rental Transactions -KRT's

KRT: 1 Lower Baggot Street Dublin 2 - food use

Total Floor Area	67.51M <sup>2</sup>
Lease commencement	Jan. 2012
Lease term	10 years



Rent pa	€42,000
Retail Zone A	€1,008.10M <sup>2</sup>
NER @ 7 <sup>th</sup> April 2011	€42,769.
NAV	€38,400

#### Valuation Report

Floor level	Floor Use	Area M <sup>2</sup>	NAV/ €M <sup>2</sup>	NAV €
Ground	Retail zone A	38.97M <sup>2</sup>	€900	€35,073.00
Ground	Retail zone B	2.84 M <sup>2</sup>	€450	€1,278.00
Basement	Store	25.70 M <sup>2</sup>	€80	€2,056.00
			Total	€38,407 Say €38,400

#### KRT 2: Lower Baggot Street Dublin 2 - Pharmacy

Total Floor Area	635.99M <sup>2</sup>
Lease commencement	Aug. 2011
Lease term	14 years
Rent pa	€132,344
Retail Zone A	€942.06M <sup>2</sup>
NER @ 7 <sup>th</sup> April 2011	€133,483.
NAV	€127,500

#### Valuation Report

Floor level	Floor Use	Area M <sup>2</sup>	NAV/ €M <sup>2</sup>	NAV €
Ground	Retail zone A	44.04M <sup>2</sup>	€900	€39,636.00
Ground	Retail zone B	47.08 M <sup>2</sup>	€450	€21,186.00
Ground	Retail zone C	48.17 M <sup>2</sup>	€225	€10,838.25
Ground	Remainder	496.70 M <sup>2</sup>	€112.50	€55,878.75
			Total	€127,539 Say €127,500

#### KRT 3: Lower Baggot Street Dublin 2 -food use

Total Floor Area	76.70M <sup>2</sup>
------------------	---------------------

Lease commencement	Aug. 2011
Lease term	15 years
Rent pa	€25,000
Retail Zone A	€895.00M <sup>2</sup>
NER @ 7 <sup>th</sup> April 2011	€23,572.
NAV	€23,800

#### Valuation Report

Floor level	Floor Use	Area M <sup>2</sup>	NAV/ €M <sup>2</sup>	NAV €
Ground	Retail zone A	21.30M <sup>2</sup>	€900	€19,170.00
Ground	Retail zone B	0.80 M <sup>2</sup>	€450	€360.00
Basement	Store	54.60 M <sup>2</sup>	€80	€4,368
			Total	€23,800.00

#### KRT 4: Merrion Street Upper Dublin 2 food use

Total Floor Area	26.23M <sup>2</sup>
Lease commencement	Feb. 2012
Lease term	15 years
Rent pa	€26,000
Retail Zone A	€1,026.50M <sup>2</sup>
NER @ 7 <sup>th</sup> April 2011	€26,925.
NAV	€23,600

#### Valuation Report

Floor level	Floor Use	Area M <sup>2</sup>	NAV/ €M <sup>2</sup>	NAV €
Ground	Retail zone A	26.23M <sup>2</sup>	€900	€23,607.00
			Total	€23,607
				Say €23,600

#### KRT 5 11 Merrion Row Dublin 2 – Restaurant/ food use

Total Floor Area	239.27M <sup>2</sup>
Lease commencement	2 <sup>nd</sup> Aug. 1994
Lease term	23 years

Rent pa	€80,000 (abated 2010 for 2 years)
Retail Zone A	€1,165M <sup>2</sup>
NER @ 7 <sup>th</sup> April 2011	€74,462.
NAV	€60,300

### Valuation Report

Floor level	Floor Use	Area M <sup>2</sup>	NAV/ €M <sup>2</sup>	NAV €
Ground	Retail zone A	34.76M <sup>2</sup>	€900	€31,284.00
Ground	Retail zone B	14.44 M <sup>2</sup>	€450	€6,498.00
1 <sup>st</sup> floor	Restaurant	55.80 M <sup>2</sup>	€132	€7,365.60
1 <sup>st</sup> floor	Kitchen	8.72 M <sup>2</sup>	€120.00	€1,046.40
2 <sup>nd</sup> floor	Kitchen	61.39 M <sup>2</sup>	€120.00	€7,366.80
Basement	Restaurant	55.28 M <sup>2</sup>	€110	€6,080.80
Basement	Store	8.88 M <sup>2</sup>	€80.00	€710.40
			Total	€60,352.00 Say €60,300

Ms Callan also provided eight NAV comparisons.

### NAV 1: Molesworth Street Dublin 2 occupied by Auctioneers

Net annual value	€28,100
------------------	---------

Valued as follows:

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor zone A	17.50 M <sup>2</sup>	@	€700/ M <sup>2</sup>	€12,250.00
Ground floor zone B	14.35 M <sup>2</sup>	@	€350/ M <sup>2</sup>	€5,022.50
1st floor offices	30.50 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€3,660.00
2nd floor offices	26.60 M <sup>2</sup>	@	€100/ M <sup>2</sup>	€2,660.00
3 <sup>rd</sup> floor offices	30.50 M <sup>2</sup>	@	€80/ M <sup>2</sup>	€2,440.00
Basement store	25.90M <sup>2</sup>	@	€80/ M <sup>2</sup>	€2,072.00
			Total	€28,104.50 Say €28,100

### NAV 2: Andrew Street Dublin 2 occupied by Auctioneers

Net annual value	€25,800
------------------	---------

Valued as follows:

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor zone A	25.43 M <sup>2</sup>	@	€800/ M <sup>2</sup>	€20,344.00
Ground floor offices	13.84 M <sup>2</sup>	@	€80/ M <sup>2</sup>	€1,107.20
Basement offices	39.78 M <sup>2</sup>	@	€110/ M <sup>2</sup>	€4,375.80
			Total	€25,827.00
				Say €25,800

NAV 3: Trinity Street Dublin 2 occupied by Auctioneers

Net annual value	€54,000 and €25,400
------------------	---------------------

Valued as follows:

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor zone A	48.89 M <sup>2</sup>	@	€800/ M <sup>2</sup>	€39,112.00
Ground floor zone B	31.84 M <sup>2</sup>	@	€400/ M <sup>2</sup>	€12,736.00
Ground	-1M <sup>2</sup>	@	€2,592.40/ M <sup>2</sup>	-€2,592.40
Basement store	60.00	@	€80/ M <sup>2</sup>	€4,800
			Total	€54,055.60

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
1 <sup>st</sup> offices	65.29 M <sup>2</sup>	@	€150/ M <sup>2</sup>	€9,793.50
2 <sup>nd</sup> offices	65.29 M <sup>2</sup>	@	€130/ M <sup>2</sup>	€8,487.70
3 <sup>rd</sup> offices	65.29M <sup>2</sup>	@	€110/ M <sup>2</sup>	€7,181.90
			Total	€25,463.10
				Say €25,400

NAV 4: St. Stephen's Green Dublin 2 occupied by Auctioneers

Net annual value	€148,500
------------------	----------

Valued as follows:

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
-------	---------------------	---	------------------------	-------

Ground floor zone A	57.27 M <sup>2</sup>	@	€925/ M <sup>2</sup>	€52,974.75
Ground floor zone B	48.33 M <sup>2</sup>	@	€462.50/ M <sup>2</sup>	€22,352.62
Ground floor offices	58.50 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€7,020.00
1 <sup>st</sup> floor offices	172 M <sup>2</sup>	@	€176/ M <sup>2</sup>	€30,272.00
2 <sup>nd</sup> floor offices	172 M <sup>2</sup>	@	€110/ M <sup>2</sup>	€18,920.00
Basement store	155M <sup>2</sup>	@	€110/ M <sup>2</sup>	€17,050.00
			Total	€148,589.38
				Say €148,500

NAV 5: Kildare Street Dublin 2 occupied by Auctioneers

Net annual value	€28,600
------------------	---------

Valued as follows:

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor zone A	24.62 M <sup>2</sup>	@	€700/ M <sup>2</sup>	€17,234.00
Ground floor offices	44.67 M <sup>2</sup>	@	€80.00/ M <sup>2</sup>	€3,573.60
1 <sup>st</sup> floor offices	22.80 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€2,736.00
1 <sup>st</sup> floor store	28.13 M <sup>2</sup>	@	€120/ M <sup>2</sup>	€3,375.60
Basement store	22.20 M <sup>2</sup>	@	€80/ M <sup>2</sup>	€1,776.00
			Total	€28,695.20
				Say €28,600

NAV 6: Merion Row Dublin 2 occupied by food use

Net annual value	€ 64,600
------------------	----------

Valued as follows:

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor zone A	37.33 M <sup>2</sup>	@	€900/ M <sup>2</sup>	€33,597.00
Ground floor zone B	34.04 M <sup>2</sup>	@	€450/ M <sup>2</sup>	€15,318.00
Ground floor zone C	32.81 M <sup>2</sup>	@	€225/ M <sup>2</sup>	€7,382.25
Basement store	104.82 M <sup>2</sup>	@	€80/ M <sup>2</sup>	€8,385.60
			Total	€64,682.85

				Say €64,600
--	--	--	--	-------------

NAV 7: Merion Row Dublin 2 occupied as retail

Net annual value	€37,700
------------------	---------

Valued as follows:

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor zone A	24.95 M <sup>2</sup>	@	€900/ M <sup>2</sup>	€22,455.00
Ground floor zone B	22.55 M <sup>2</sup>	@	€450/ M <sup>2</sup>	€10,147.50
Ground floor zone C	5.48 M <sup>2</sup>	@	€225/ M <sup>2</sup>	€1,233.00
Basement shop	28.30 M <sup>2</sup>	@	€110/ M <sup>2</sup>	€3,113.00
Basement store	9.92	@	€80/ M <sup>2</sup>	€793.60
			Total	€37,742.10 Say €37,700

NAV 8: Lower Baggot Street Dublin 2 occupied for food use

Net annual value	€49,700
------------------	---------

Value as follows:

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground floor zone A	37.15 M <sup>2</sup>	@	€900/ M <sup>2</sup>	€33,435.00
Ground floor zone B	25.08 M <sup>2</sup>	@	€450/ M <sup>2</sup>	€11,286.00
Basement store	62.70 M <sup>2</sup>	@	€80/ M <sup>2</sup>	€5,016.00
			Total	€49,737.00 Say €49,700

8.14 Ms. Callan said NAV 1 on Molesworth Street was also occupied by a Chartered Surveyor/auctioneer and in close proximity to the Property. She said the Respondents other comparisons had an established use as Chartered Surveyors and valuers. She said NAV 1, was not as prominent as the Property but also had offices in upper and lower floors and was valued at €700/M<sup>2</sup>. She was asked if she would value NAV 1 differently if the pictures were not displayed in the window and she said she would not. She said estate agents advertise leases or commercial properties and the Property has a retail zone with frontage. She said there are 150

Estate Agents within Dublin, all rated on a Retail Zoning basis with one exception which had no frontage.

8.15 She said NAV 1 on Molesworth Street and NAV 4 on St. Stephen's Green, were also protected structures. Ms. Callan said there were 54 properties in the vicinity of the Property and only one under appeal. She said there would be no uniformity and equity if the Property was not valued at €900 zone A.

8.16 Ms. Callan commented on the Appellant's comparisons; She said NAV 1, a different Molesworth Street property to the Respondents NAV 1 comprised a purpose built office not inviting the public in or to walk in, NAV 2, Kildare Street is a Georgian building on the ground floor, there is no retail frontage, NAV 3, on Lower Baggot Street is a Georgian building with no display windows, NAV 4, Molesworth Street, is a second generation office and the same applies to NAV 5, St. Stephens Green.

8.17 During cross examination, Ms. Callan said she didn't have regard to planning permission when rating and that the Respondent looks at Section 48, the hypothetical tenant. Mr. Hickey put it to Ms. Callan that she assumes it's a shop and she doesn't value its current use. Ms. Callan said we don't value on use, but on potential use, not current use. Mr. Hickey said it is used as an office with two secretaries and she was assuming it was a shop for the purpose of valuation. Mr. Hickey asked what examples she had looking at the whole building as a hypothetical tenant, with the property vacant to let and if she had a comparison of a whole building near the Property to let, to which she said she did not. Ms Callan agreed her first four key rental comparisons were ground floor retail units, and KRT 5, was a restaurant.

8.18 Ms. Callan said that she established the ground floor first. Mr. Hickey said the valuation approach was misconceived and the hypothetical tenant is bidding for the whole building. Mr. Hickey put it to Ms. Callan that 4 out of the 5 KRT's comprise ground floor only shop units and asked how she could say they are comparable properties. Ms Callan said it was the market evidence available. She did not agree that her valuation approach was wholly misconceived. He said the Property is a 4 storey over basement building and this application is misconceived. She said she has valued as best she can. Mr Hickey said that four out of five of the Respondents Key Rental comparisons comprised ground floor or ground floor and basement only similar to lockup shops and that Mr. O'Donoghue had said that a premium applies for food and suggested

that the Respondent's key comparisons were wrong. Mr. Dodd said no evidence had been raised on this point.

8.19 Mr. Hickey said NAV 1, Molesworth Street sells art. Ms Callan said she had not been in the property, that they are estate agents and agreed it is not the entire building that is valued. Mr. Hickey asked what the differences between the Property and NAV 1 were. She said it is a small ground floor shop. NAV 3, Trinity Street, was over 2 separate ground floor shops with 2 separate entries on the list. Mr. Hickey asked if it was ground floor only and Ms. Callan agreed it was. Ms Callan agreed that the corner property, NAV 4, St. Stephen's Green, was probably not a comparison and that she hadn't been in it. She said NAV 5, Kildare Street, has an office on the ground floor with retail accommodation to the front. Mr. Hickey said it is not really a fair or appropriate comparison as Ms. Callan had extrapolated a 4-storey office building from top to bottom and put it to her that it doesn't "cut the mustard" to which Ms. Callan said she thought they were the best comparisons the Respondent had.

8.20 Mr. Hickey asked Ms. Callan what her understanding of emerging tone of the list was and what was wrong with Mr. Donoghue's dealing with valuations as they are just as good as Key Rental Transactions. Ms Callan said she accepted that. Mr. Hickey put it to Ms. Callan 'that the best you could do wasn't appropriate'. Ms. Callan said she took his point. Mr. Hickey said a similar building did not comprise lock up shops to which Ms. Callan said she accepted that point.

8.21 In re-examination of Ms. Callan, Mr. Dodd said the Appellant had looked at second floor offices which were all significantly more than what she had applied. She said NAV 1, Molesworth Street was valued as a whole building, NAV 2, Andrew Street, was over 2 floors in one occupation, NAV 3, Trinity Street, NAV 5, Kildare Street and NAV 4, St. Stephen's Green, were also in single occupation.

## **9. APPELLANT'S LEGAL SUBMISSIONS**

9.1 Mr Hickey said that the evidence of the Appellant's Architect, Mr. Mc Hugh was uncontradicted. He said that Mr Mc Hugh had modestly suggested that he was not an expert but that he was a Conservation Architect with over 30 years' experience and his evidence was admissible and weighty.



9.2 Ms. Callan, the Valuer for the Respondent had accepted the frailty of the properties she had submitted by way of comparison.

9.3 He said that the legal issue in the case had been determined twice by the Valuation Tribunal, firstly in the case of David Wally & Co. v Commissioner of Valuation (VA14/5/087 and secondly in the case of Patrick F O'Reilly & Co Solicitors v Commissioner of Valuation (VA 14/5/087) and that in both these cases the Tribunal found for the position contended for by the Appellant in the present case. He said that it was understood that both cases cited are the subject of requests by the Respondent to the Valuation Tribunal to prepare and forward a Case Stated to the High Court.

9.4 Harper Stores Ltd v Commissioner of Valuation [1968] 1 I.R 166 was he said, the seminal authority governing this case and where he said Henchy J approved the following principles:

At page 172 *"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 principal rebus sic stantibus. As Lord Parmoor said in Great Western and Metropolitan Railway Companies v Kensington Assessment Committee (1): \_\_\_\_\_ "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... 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 all the existing factors that go to make up the premises as they are currently occupied and used or "all that would affect the rent that would be paid by a hypothetical tenant"- per Lord Ashbourne C., in Armstrong's Case (2), at p.501. 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 in deciding what rent he would pay"*.

9.5 He submitted that the words of Henchy J in that case at page 174 *"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, in order to achieve a correct assessment, have to look at past, present and future,"* cannot be construed as permitting a fundamental departure from the overriding principle of valuation and rating law of rebus sic

stantibus. Henchy J correctly applied those words to the particular facts and circumstances of that case which were that the property at issue was used as a drapery store before and after the ten-week period during which certain reconstruction works were carried out. However, he said the facts in the Harper Stores case were entirely different from the facts in the present case and he submitted that it was wholly erroneous to attempt to extrapolate from that case a legal principle to be applied to cases concerning completely different facts. In particular he said that in the David Wally case the Respondent sought to invoke this passage in support of the contention that the premises in that case which were used and occupied at offices, should be valued as a shop. The facts in that case were similar although not identical to the Property, concerning premises in use as offices which would have required planning permission for a change of use to retail use, an up-to-date fire certificate, and compliance with relevant building control regulations. He said that the Valuation Tribunal rejected the Respondent's submission that the premises should be rated as retail "*valuing the subject property as retail by reason of the fact that it is in a parade of retail units, has a retail type display window and is in an area zoned for mixed-use favouring retail strikes the tribunal as a little bit unreal*" and he submitted that this was the correct approach.

9.6 Reference was made to the Patrick F O'Reilly case which he said was also on similar, although not identical facts to the Property, concerning premises in use as Solicitors' offices and where the Respondent sought to rate on a retail basis. The Tribunal in referring to the rebus sic stantibus principle stated "*it is the value of the property in its actual state that falls to be determined, and to take account of the value that the property would have if it were to be structurally altered is plainly to assess something different. Accordingly, the Tribunal finds that the whole of the property must be valued in its existing or actual state as a fully fitted office building and not for some other potential form of occupation such as retail at ground floor level.*"

9.7 The definition of net annual value in the English Rating and Valuation act, 1925, he said to all intents and purposes mirrors the definition of net annual value in section 48 of the Valuation Act 2001 and in Irish law prior to that, save that the definition in the 1925 English Act does not contain the words "in its actual state". However, he said the principle of "in its actual state" or "rebus sic stantibus" was and remains embedded in English law before and after the 1925 statute.

9.8 In the event that the Respondent should rely on the English case of *Midland Bank v Lanham*, [1978] RA, he submitted that this decision had been effectively disapproved by the Supreme Court of Judicature Court of Appeal in the case of *R.F. Williams (Valuation Office) v Scottish & Newcastle Retail Ltd.* [2001] EWCA Civ 185.

9.9 Mr Hickey said that the Valuation Tribunal had expressly endorsed the application of the “mode or category” principle in the case of *Mr Jason Bonney t/a Bonney Baby’s Crèche v Commissioner of Valuation (VA 02/5/027)* where at paragraph 2 of its determination it was stated as follows *"the statutory definition for the valuation of a relevant property requires that it be valued "in its actual state". Hence it is necessary to take into account the mode or category of use as well as the physical state and circumstance of the building. In regard to the subject property it was built and designed as a crèche and is used as a crèche accordingly, therefore it should be valued as the crèche"*.

9.10 Finally, he submitted that the principle of *rebus sic stantibus* and the associated open court “mode or category” principle, are applicable whether or not planning permission would be required in any particular case.

## **10. RESPONDENT’S SUBMISSIONS**

10.1 In his submission, Mr. Dodd said the onus is on the Appellant to prove that the valuation is incorrect. He said the Appellant’s valuer produced no market evidence whatsoever. Mr. Dodd said you have to look at market evidence. He questioned, what is the Chartered Surveyors/auctioneers/ valuers/ estate agents common use.

10.2 Mr Dodd said Ms. Conroy looked at Thom’s Directory which states the established use as estate agents and auctioneers. The Appellant says that it is office use. Mr. Dodd said Mr. Hickey keeps attempting to say office use and his witnesses say estate agent. He said any estate agent can use this property. He said the Respondent is not valuing the business but the property. He said it is the Appellant’s commercial choice not to display in the window. He said the evidence of 150 Estate Agents within Dublin, all rated on a Retail Zoning basis with one exception which had no frontage was unchallenged by the Appellant. He said the Appellant has an established use as estate agents, they are valued on a Zone A basis, they sell housing and properties, the doors are open from 9 to 5:30 as a receptionist opens the front door, the door wouldn’t be unopen at 10:30, the fact that people ring doesn't change the use of the business in the modern

world and because there are no pictures in the window does not mean the Respondent has to value the Property differently. He repeated that any estate agent could put pictures up. He said Mr. McHugh and Ms. Conroy agreed it was Class 2. He said the Property is a hybrid not an office. He said real property is bought and sold here, it is Zone A, similar to cafés and restaurants, which had no difficulty with Zone A being applied and estate agents fall into this type of property. It is a business choice to put pictures up. He said the valuation in comparison with other estate agents has equity and uniformity.

10.3 Mr. Dodd said when tested Mr. McHugh wasn't an expert under building control or planning. Mr. Dodd suggested that if he was wrong on the planning application, including the statutory consents, of which Dublin City Council deal with, fire alarms, doors at stairwell and floor separation, he has a fallback position. He said Mr. McHugh carried out a superficial visual examination of the Property. Mr. Dodd referred to the Armstrong case discussed in *Harper Stores Ltd, v Commissioner of Valuation* [1968 No.139 SS], "*It seems to me that the words "actual state" connote all the existing factors that go to make up the premises as they are currently occupied and used or "all that would affect the rent that would be paid by a hypothetical tenant" – per Lord Ashbourne C. in Armstrong's case (2), at p. 501. 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 in deciding what rent he would pay*". He continued that it was held, "*It is a matter of intention and of the degree, or quality, of use. "The relevant intention", said Wright J. in London County Council v. Hackney Borough Council (4) "must, I think, have regard to employment of the premises in the rating year and to an employment for which they were suited or readily capable of being suited in their then actual condition"*". He questioned what the Property is suited to. He said his fallback position is that the Property is in use as an estate agent and is suitable as an estate agent.

## **11. REPLIES**

11.1 Mr Hickey, responding to Mr. Dodd's submissions said firstly that Mr Dodd had fallen into exactly the same error as the Respondent's valuer in that he was talking about the ground floor and that the established use was for the whole building. Mr Dodd's contention that because the Appellant's Valuer had not produced market evidence and evidence only of tone of the list comparisons where he said there was no tone it being a revaluation where the whole object was to create a list, was not as Mr Dodd asserted dispositive of anything. Secondly, he said that it was not the common case as asserted by Mr Dodd that the current use was in Class

2. Thirdly again on the point made by Mr Dodd that the Appellant's Valuer had not produced any market evidence, he said that on the correct interpretation of the Carlton case this did not preclude properties on the list being looked at. In particular he referred to section 31 (a) (ii) of the Valuation Act 2001 and said that this allows an Appellant in an appeal to specify what the Appellant considers ought to have been determined as the property's value by reference to values stated in the valuation list in which the property concerned appears, of other comparable properties. This section was in force at the valuation date of the Property being the 7<sup>th</sup> April 2011. The Respondent's Valuer had said that planning would be required for a change of use to shop. The Respondent's points made regarding the planning application had been completely contradicted by the Respondent's Planner in her evidence.

## **12. FINDINGS AND CONCLUSIONS**

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

12.2 The Property is currently in use as an Auctioneers/Estate Agents and it was not in dispute that such use commenced prior to the introduction of the Local Government (Planning and Development) Act, 1963. It was agreed by Mr Mc Hugh, Architect (Appellant's witness) and Ms Conway of Dublin City Council (Respondent's witness) that such use falls within Class 2 (b) of Part 4 of Schedule 2 of the Planning Regulations. Class 2 of the Planning Regulations is as follows

*“CLASS 2 Use for the provision of—*

*(a) financial services,*

*(b) professional services (other than health or medical services),*

*(c) any other services (including use as a betting office),*

*where the services are provided principally to visiting members of the public”.*

The Planning Regulations define shop as follows:

*'shop' means a structure used for any or all of the following purposes, where the sale, display or service is principally to visiting members of the public –*

- (a) for the retail sale of goods,*
- (b) as a post office,*
- (c) for the sale of tickets or as a travel agency,*
- (d) for the sale of sandwiches or other food or of wine for consumption off the premises, where the sale of such food or wine is subsidiary to the main retail use, and "wine" is defined as any intoxicating liquor which may be sold under a wine retailer's off-licence (within the meaning of the Finance (1909-1910) Act, 1910), 10 Edw. 7. & 1 Geo. 5, c.8,*
- (e) for hairdressing,*
- (f) for the display of goods for sale,*
- (g) for the hiring out of domestic or personal goods or articles,*
- (h) as a launderette or dry cleaners,*
- (i) for the reception of goods to be washed, cleaned or repaired,*

*but does not include any use associated with the provision of funeral services or as a funeral home, or as a hotel, a restaurant or a public house, or for the sale of hot food or intoxicating liquor for consumption off the premises except under paragraph (d), or any use to which class 2 or 3 of Part 4 of Schedule 2 applies.*

12.3 NAV is defined in section 48 (3) of the Act (as it stood on the Valuation Date) as "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 average 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 and charges (if any) payable by or under any enactment in respect of the property, are borne by the tenant." The issue which arises for determination in this case is whether the Respondent in applying the zoning method of valuation for retail shops to the ground floor of the Property (The Valuation Certificate for the Property describes it as being in the category "Retail( Shops)" and Use as being "Shop (Offices)", did in fact estimate the net annual value of the Property "in its actual state" . The Appellant contends that the ground floor is an office and that it was not valued "in its actual state".

12.4 The use of the words “in its actual state” which also appeared in the statutory predecessor to section 48(3) was considered by Mr Justice Henchy in the Harper Stores case in which he held that “the use of the words “actual state” does no more than apply to the subject matter of the valuation the principle of *rebus sic stantibus*”. Mr Justice Henchy cited with approval Lord Parmoor’s exposition of those words in *Great Western and Metropolitan Railways Companies v Kensington Assessment Committee* [1916] 1 AC 23 at page 54 “*the hereditament should be valued as it stands and as used and occupied when the assessment is made*” and the following statement of Lord Chief Justice O’ Brien in *Armstrong v Commissioner of Valuation* [1905] 2 IR 448 at page 489 “*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*”. He stated that “*It seems to me that the words “actual state” connote all the existing factors that go to make up the premises as they are currently occupied and used or “all that would affect the rent that would be paid by a hypothetical tenant”- per Lord Ashbourne C., in Armstrong’s Case (2) at p.501*”

12.5 The Tribunal notes that for the purposes of the Planning Regulations the ground floor at present is not a shop as defined therein. However, it would be expected that the hypothetical tenant in making a bid for the Property would have regard to the planning position. The Property is not currently a shop within the meaning of the Planning Regulations. It is clear also that for the purposes of the Planning Regulations the ground floor part of the subject is not an office – the term “office” does not appear anywhere in Class 2 but is used in Class 3. The Tribunal was referred to Class 14 of Part 1 of Schedule 2 of the Planning Regulations which exempts development consisting of a change of use from Class 2 use to a shop, on the conditions set out therein. The Tribunal was also referred to Article 10 of the Planning Regulations. There was a difference of opinion as to whether planning permission would be required for any change to a shop. Ms Conway in cross-examination did not disagree when it was put to her that planning would be required in order to enable the subject to be used as a shop. Limited evidence was given by the witnesses on behalf of both parties; Mr Mc Hugh for the Appellant in his Précis of Evidence stated that the scope of his instructions was to carry out a superficial visual inspection of the Property and to review and advise on any statutory consent implications arising in the event of a

change of use or partial change of use of the ground floor to a shop. Mr Nestor and Ms Conway, witnesses on behalf of the Respondent had not inspected the Property.

12.6 Having regard to the observations of Mr Justice Henchy in the Harper Stores case “*It seems to me that the words “actual state” connote all the existing factors that go to make up the premises as they are currently occupied and used or “all that would affect the rent that would be paid by a hypothetical tenant”*”, the Tribunal finds that the Property has been valued in its actual state, at the Valuation Date. Mr O’ Donoghue witness for the Appellant said that offices of Chartered Surveyors, Valuers, Estate Agents all have a tone for offices, not a tone for Chartered Surveyors, Valuers, Estate Agents. However, as noted by the Tribunal in paragraph 12.6 above the term “office” does not appear anywhere in Class 2 (b), which Mr Mc Hugh, Architect (Appellant’s witness) and Ms Conway of Dublin City Council (Respondent’s witness) agreed the Property fell within. The uncontroverted evidence of the Respondent is that 150 Estate Agents within Dublin have all been rated by reference to the zoning method of valuation for retail shops, with the exception of one which had no frontage. As regards the five NAV comparisons of Auctioneers/Estate Agents put forward by the Appellant which were valued as offices, the Tribunal noted that none of these were located on what could be described as a retail location. Further the frontage of the Appellants NAV 1, 1 Molesworth Street, NAV 2, Kildare Street and NAV 3, Lower Baggot Street were not comparable to the subject in the sense that all of these properties were set back somewhat from the road abutting them. NAV 4 located in Molesworth Street and NAV 5 located in St. Stephen’s Green are in what would be regarded as more conventional office locations. The fact that the Respondent has applied the zoning method of valuation for retail shops to the ground floor of the Property which it is accepted is in use as Auctioneers/Estate Agents does not on the facts of this case offend the principle of “*rebus sic stantibus*” and to have valued otherwise would be to offend the requirement of equity and uniformity, having regard to the uncontroverted evidence of the Respondent that 150 Estate Agents in Dublin have all been rated by reference to this method of valuation.

12.7 However, the Tribunal must also consider the levels applied by the Respondent when applying this zoning method of valuation for retail shops to the ground floor of the Property. The Appellant did not put forward any KRT’s and the properties put forward as NAV’s are not as stated above comparable. The Respondent’s five KRT’s are clearly not comparable as four are food outlets and one is a retail pharmacy. Of the eight NAV comparators provided by the



Respondents, the restaurant on Merrion Row which is a food outlet is not comparable, the Respondent's valuer accepted that her St. Stephen's Green NAV was not comparable, the NAV for Andrew Street refers to a ground floor and basement only and the Trinity Street NAV, comprises two separate valuations. In that respect none of these NAV comparisons are directly comparable to the Property. The Tribunal finds that the Respondent's valuer erred in her approach to the valuation of the Property in that she gave insufficient consideration to the fact that the hypothetical tenant would be bidding for the entire building. The hypothetical tenant would be deemed to be taking a tenancy from year to year of the entire property which comprises not only the ground floor which has been valued on the basis of three retail zones but also four other floors including the basement, all valued as offices. It was not in dispute that the entire building as it stands at present, with one single front entrance, can currently only be used by one occupier.

The established zone A rate for Merrion Row is €900. However, taking account of the Tribunal's finding that the hypothetical tenant would be bidding for the entire building, the Tribunal finds that it is not appropriate to value the ground floor at this rate. The Tribunal has noted that the Respondent's NAV 1 and NAV 5 also are each in one single occupation and are also similar to the Property in that they are protected structures. However, unlike the Property, the retail zones A have been valued at in both instances at a rate of €700 per m<sup>2</sup>, compared to the Property which has been assessed at a rate of €900 per m<sup>2</sup>. Consequently, having regard to these rates the Tribunal finds that a discounted rate of €800 per sq. m<sup>2</sup> is more appropriate, applied as follows. No issue was raised as to the valuation of the basement and the upper floors and the Tribunal confirm the level published.

Floor	Area M <sup>2</sup>	@	Rate €/ M <sup>2</sup>	€ NAV
Ground Zone A	28.78	@	€800.00	€23,024.00
Ground Zone B	12.01	@	€400.00	€4,804.00.
Ground Zone C	43.47	@	€200.00	€8,694.00
1 <sup>st</sup> floor offices	75.97	@	€120.00	€9,116.40
2 <sup>nd</sup> floor offices	40.79	@	€100.00	€4,079.00
3 <sup>rd</sup> floor offices	40.79	@	€80.00	€3,263.20
Basement stores	39.59	@	€80.00	€3,167.20
				€56,147.80
				Say €56,100

;

**DETERMINATION:**

Accordingly, for the above reasons, the Tribunal allows the appeal and decreases the valuation of the Property as stated in the valuation certificate to €56,100.

And the Tribunal so determines.