[2020] IEHC 31

THE HIGH COURT

[RECORD NO. 2019/236 SS]

IN THE MATTER OF SECTION 39 OF THE VALUATION ACTS, 2001 – 2015
AND IN THE MATTER OF APPEAL VA 17/3/022
AND IN THE MATTER OF BLOCKS A, B, C, D AT 'BANKCENTRE" MERRION ROAD, BALLSBRIDGE, DUBLIN 4

BETWEEN

FIBONACCI PROPERTY ICAV

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Ms. Justice Hyland delivered on the 17th day of January 2020

1. Four questions of law have been stated to the High Court. The questions are as follows:

> *(1) Did the Tribunal err in law in determining that the properties the subject matter of this appeal are not capable of beneficial occupation within the meaning of the Valuation Acts?*
>
> *(2) Did the Tribunal err in law in determining that the car park, subject of the appeal, ought to be included in the valuation list of the rating authority of Dublin City Council, determining the valuation of the car park to be €162,500, and amending the description of the remainder of the Property to be entered on the valuation list to Car Park? (this follows from the primary question). (3) Did the Tribunal err in law in its view that under section 48 of the Act it should not be assumed that the Property is in a reasonable condition and state of re-pair and that the express statutory assumption as to the nature of the hypothetical tenancy is that the property is to be valued in its "actual state" as opposed to an assumed state of reasonable condition and repair? [See paragraph 10.7 of Tribunal's judgment].*
>
> *(4) Did the Tribunal err in law in determining that it would cost approximately €12,000,000 to reconnect the Property to services in order to command a rent of €1,871,000 per annum, in accepting the Appellant's argument that no hypothetical tenant would take a letting of the Property at that rent in circumstances where he would have to expend such a significant sum on reconnection works that would take 18 months to complete, and in holding that the absence of consent to use any pipes, drains, conduits, services, utilities, systems or services of any kind in or under the Property had, in the Tribunal's opinion, so adversely affected the Property that it was rendered incapable of beneficial occupation ? [See paragraph 10.12 of Tribunal's judgment]."*

Nature of review of the High Court

2. Under s.39 of the Valuation Act 2001 as amended (the "2001 Act"), where a party is dissatisfied with the determination of the Tribunal it may require the Tribunal to state and sign a case for the opinion of the High Court. Section 39(5) provides as follows:

"The High Court shall hear and determine any questions of law arising on the case, and shall reverse, affirm or amend the determination in respect of which the case has been stated, or shall remit the matter to the Tribunal with the opinion of the Court thereon, or may make such other order in relation to the matter as the Court thinks fit".

3. The law in respect of the nature of the review the High Court shall carry out in respect of a decision of a valuation tribunal is well settled. In *Premier Periclase Limited v. Commissioner of Valuation* [1999] IEHC 8, Kelly J. (as he then was) observed that, given the nature of the valuation tribunal being an expert administrative tribunal, a court should be slow to interfere with its decision. Kelly J. found that the court should only do so on the basis of an identifiable error of law or an unsustainable finding of fact. That approach has been repeated in subsequent cases, including the judgment of MacMenamin J. in *Nangle Nurseries v. Commissioners of Valuation* [2008] IEHC 73.

Background to the Case Stated

4. On the 25th of September 2016 an application was made on behalf of RGRE Ballsbridge Developments Ltd. to the Commissioner for the appointment of a revision manager to exercise powers under s.28 (as substituted by s.13 of the Valuation (Amendment) Act 2015) of the 2001 Act in respect of the property the subject of these proceedings, being blocks A,B,C and D Bank Centre, Ballsbridge, Dublin 4 (the "Property") together with associated car parking spaces office buildings due to a material change of circumstance.

5. The revision manager accepted a material change of circumstance existed in respect of the Property since its last valuation to warrant the exercise of powers under s.28 of the Act and a copy of the proposed valuation certificate was issued in respect of the Property on 11th October 2016 indicating a value of €1,871,000.

6. Representations were made to the revision manager in respect of the proposed valuation. The revision manager did not alter the valuation and a final valuation certificate specifying a valuation of €1,871,000 was issued on the 23rd August 2017.

7. An appeal against that decision was lodged to the Valuation Tribunal (the "Tribunal") on the 19th September 2017. It proceeded by way of an oral hearing on the 24th and 25th July 2018. The Tribunal gave judgment on 7th November 2018. It held that buildings A, B, C and D of the Property were unoccupied and not capable of beneficial occupation by the appellant. Accordingly, the Tribunal allowed the appeal and (1) decided that the part of the Property comprising blocks A, B, C and D was to be excluded from the valuation list of the rating authority area of Dublin City Council, (2) decided that the remainder of the Property comprising the carpark was to be included in the valuation list of the rating authority area of Dublin City Council and determined the valuation of the carpark to be €162,500, and (3) amended the description of the Property to be entered on the valuation list to Car Park.

8. I should note that by the time the appeal came on for hearing before the Tribunal, the owner of the Property was no longer RGRE Ballsbridge Developments Limited, but

Fibonacci Property ICAV (hereafter "Fibonacci") and same were substituted as appellant without objection.

Core issue in Case Stated

9. At the heart of this case is the discrete question as to whether the Tribunal erred in its conclusion that the Property was not capable of rateable valuation in circumstances where it found that neither the owner nor a hypothetical tenant could enjoy beneficial occupation of same due to the state of the Property, being completely devoid of any services including lighting, power, water, foul drainage and fire alarm systems, and in particular whether the Tribunal's treatment of the hypothetical tenant was correct. I must also decide whether the Tribunal was correct in its conclusion that, having regard to s.48(3) of the 2001 Act, the Property must be valued in its actual state as opposing to valuing it on the assumption that the Property was in good order, as was done by the Commissioner.

Brief history of the Property

10. The Property is situated at the junction of Merrion Road and Serpentine Avenue in Ballsbridge, Dublin 4 opposite the RDS. The Property is situated on 3.7 acres and comprises four vacant three and four storey office buildings, being blocks A, B, C and D. It was built circa 1977 and was formerly part of the AIB Bank Centre. It was sold in 2006 by AIB to Mountbrook Ltd. subject to an occupational lease between AIB and others. Following the expiry of that lease in 2011, a further lease was secured from Mountbrook Ltd. by AIB up to the end of December 2014. In October 2015 RGRE Ballsbridge Developments Limited purchased the Property and its interest was transferred to Fibonacci in May 2016. Upon the initial sale of the Property to Mountbrook no easements were reserved for servicing the Property and the deed of transfer excluded implied easements. AIB reserved the right to disconnect and close any interconnecting systems services and openings between the Property and the buildings to the rear of the Property continuing in the ownership and occupation of AIB.

11. Upon the expiry of AIB's lease at the end of December 2014, the Property became vacant and remains so. After vacating the Property, AIB disconnected all services to the Property though a 28-amp electricity supply continues to be maintained for live systems. As a result, the four buildings have no lighting or power no water, no foul drainage and no fire alarm system. Discussions were had with AIB to address the making of connections into the AIB foul drainage water supply and fire hydrant services but agreement could not be reached.

Summary of evidence before the Tribunal

12. The Judgment of the Valuation Tribunal of the 7th November 2018 ("the Judgment") sets out in some detail the evidence heard in respect of the Property, the reconnection costs and the nature of the work that would be required. Detailed evidence was given on behalf of Fibonacci by Mr. Sutton, civil structural engineer, Mr. McNulty, mechanical and electrical engineer, Mr. Brennan, senior planner, Mr. O'Broin of Linesight Construction, specialising in quantity surveying and project management and Mr. O'Donohoe, valuation surveyor. Mr. O'Broin estimated the minimum cost of the reconstruction works, being new entrances and reception areas, minor repairs, cleaning and decorative works, new

mechanical service installations that would be required and the servicing, testing and commissioning of the various services and systems, to be €9,174,000 excluding VAT and the non-construction costs to be circa €2,280,000 excluding VAT, which works were itemised in Appendix A of his Precis of Evidence. Mr. McNulty had given evidence that an application would have to be made to the ESB to reinstate power and planning permission would have to be sought for a new external substation. Mr. O'Broin estimated the planning process for same would take at least 10 months and the works programme 18 months. Mr. O'Donoghue gave evidence that the Property, having been vacant since 2014, was unlettable excluding the car parking spaces and was therefore incapable of beneficial occupation for use as offices owing to the time and costs involved in re-commissioning the necessary services and systems. He stated he did not believe that any hypothetical tenants would pay almost €1,900,000 in annual rent and €500,000 in rates in circumstances where he would not be able to occupy the Property for a period of 18 months.

13. The only witness to give evidence on behalf of the Commissioner was Mr. John O'Brien, being the revision manager who had signed the final valuation certificate.

14. Mr. O'Brien gave evidence of his inspection of the Property. He indicated that in valuing the Property he was required to assume that it was in reasonable condition and state of repair for its age, profile and construction. He stated he assumed services were readily available at the date of inspection and on the relevant valuation date. He confirmed that he would value a property in a poor state of repair as if it were in good repair. He accepted that he knew that the services were disconnected but he assumed reconnection would be feasible and economical. He agreed he had valued the Property as if it were connected to all main services and he had assumed that water and electricity services were readily available on the Merrion Road or the adjacent roads to the Property. He confirmed he made no enquiries as to the actual costs or duration of the reconnection work.

15. Having regard to the evidence before it, the Tribunal concluded that the total cost of the reconnection work on the commissioning of the Property's main services would be in the region of €12m and the works would take approximately 18 months to complete. It further concluded that no hypothetical tenant would be willing to take a letting of the Property at the rent identified in the Valuation Certificate in circumstances where it would have to expend such a significant sum on reconnection works that would take 18 months to complete. Accordingly, it concluded that the absence of consent to use pipes, drains, conduits, services, utilities, systems or services of any kind in or under the Property had so adversely affected the Property that it had rendered it incapable of beneficial occupation (paragraph 10.12).

Statutory Framework

16. The Valuation Act 2001 as amended ("the 2001 Act") is, as described in its preamble, an Act to revise the law relating to the valuation of properties for the purposes of the making of new rates in relation to them.

17. Section 15 of the Act provides that "relevant property" shall be rateable and the meaning of relevant property is critical to the issues arising in this Case Stated. Schedule 3 of the Act identifies relevant property. Section 1 of Schedule 3 identifies the nature of relevant property and includes lands used or developed for any purpose and any constructions affixed thereto. Section 2 of Schedule 3 requires that the property:

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

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

18. Part 11 of the Act sets out the basis of valuation. Section 48(1) identifies that the value of a relevant property shall be determined by estimating the net annual value of the property and that estimate shall be its value. Section 48(3) is of some importance given the case being made by the Commissioner and merits being quoted in full:

> *"S. 48(3), 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 in respect of the property, are borne by the tenants."*

Legal issues arising

19. As noted earlier in this judgment the core question in this case is whether the Tribunal erred in law in determining that the Property was not capable of beneficial occupation within the meaning of the 2001 Act and accordingly that there was no rateable occupation. Mr. Connolly SC for the Commissioner identified what the Commissioner alleges are the material errors in the decision of the Tribunal.

20. First it is said that in determining whether or not the Property was capable of being the subject of rateable occupation, the Tribunal ought to have considered the position of a hypothetical tenancy and they failed correctly to so do because (a) they did not take into account that a hypothetical tenant would have been expected to occupy the premises over a relatively lengthy period so that the cost of refurbishment or reconnection would not have operated as a complete deterrent to beneficial occupation of the Property by same; and (b) the Tribunal erred in not taking into account of the possibility of AIB as a hypothetical tenant given its particular position in relation to the reconnection of the services.

21. Second, the argument is made that the Tribunal erred in its view that under s.48 of the Act it should not be assumed that the Property is in a reasonable condition and state of repair as was done by Mr. O'Brien.

22. Third, a further argument was made at hearing that even if the Tribunal did not agree with a net annual valuation of circa €1.8 million given the condition of the property, it could and should have substituted a lesser net annual value and should not have considered itself bound by that valuation.

23. Strictly speaking, the question of the correct interpretation of s.48(3) should in my view only arise if there has been a prior determination by the Valuation Tribunal that the property in question is "relevant property" within the meaning of the Act. It is only if a property is deemed to be relevant property that it comes within s.48 at all. Nonetheless, it does appear that in deciding if the Property was capable of beneficial occupation the Tribunal employed the concept set out in s.48 in order to determine whether or not a hypothetical tenant would be interested in leasing the Property in its current state of repair. For that reason, I find that the question of the correct interpretation of s. 48(3) is material and accordingly I will answer Question 3 of the Case Stated.

Concept of beneficial occupation and its relevance to rateable occupation

24. It is common case that the owner was not in occupation on the relevant date and therefore the test is that set out in s.2 of the Third Schedule i.e. whether the property was capable of being the subject of rateable occupation by the owner of the property.

25. There is no definition of rateable occupation in the Act although there is a definition of occupier as being "*in relation to property (whether corporeal or incorporeal), every person in the immediate use or enjoyment of the property".*

26. However, there is a significant volume of case law in relation to what constitutes rateable occupation. In *Telecom Éireann v. Commissioner of Valuation* [1994] IR 66, O'Hanlon J., referring back to Keane J.'s work on "*The Law of Local Government in the Republic of Ireland"*, identified the essential ingredients of rateable occupation i.e. that it must be, (1) exclusive in the sense that the person using the hereditament can prevent any other person from using it in the same way; (2) of value or benefit to the occupier but not necessarily of financial benefit; and (3) not for too transient a period.

27. In this case the first and third requirements are not at issue but the second, i.e. whether the hereditament is of value or benefit to the occupier, is highly contested. It is common case that in deciding whether an owner is in beneficial occupation, one does not look only at the question of pecuniary benefit or whether a profit may be made but may also look at the wider question as to whether it is in "*immediate use and enjoyment of the land*" (as characterised in *Sinnott v. Neale* [1948] (IR. JUR. REP. 10, even though in that case the defendant was not in occupation of the property) or whether the occupation was of value (*O'Malley v. The Congested Districts Board* 2 [1919] IR 28).

28. In this case, in circumstances where the owner was not in occupation, the core of the Commissioner's argument appears to be that beneficial occupation should have been treated as established because a hypothetical tenant could have occupied the Property to the benefit of the owner. Thus, according to the Commissioner, the question as to whether the occupation was of value to Fibonacci should be answered in the affirmative because, even if Fibonacci itself derived no value from its ownership of the Property and was not in occupation of same, it could rent the Property to a hypothetical tenant and in that way derive benefit.

29. I am thus required to address the role of the hypothetical tenant in deciding whether or not a property meets the requirements of s.2 of Schedule 3. Section 2(b), cited above, provides that where a property is unoccupied but capable of being the subject of rateable occupation by the owner of the property, then the relevant condition will be met. There is no reference to the property being capable of occupation by a hypothetical tenant. If one were to simply look at the wording of the Act, the question of hypothetical tenant would simply not arise at all. However, it has been urged upon me by counsel for the Commissioner and accepted by counsel for Fibonacci that, despite the express wording of the Act, the case law makes it clear that the position of the hypothetical tenant must be taken into account.

30. No Irish case was cited to me addressing how s. 2(b) of Schedule 3 is to be interpreted in this respect. Nor indeed does the Irish case law predating the Act consider the question of the hypothetical tenant in the context of beneficial occupation. Rather it is only considered (albeit briefly) in the context of setting the annual valuation. So, in *Harper Stores Ltd v. Commissioner of Valuation* [1968] IR 166, Henchy J. first addressed the question as to whether the appellants were in rateable occupation of the premises and concluded at p. 173 that they were despite a period of non-occupation for ten weeks while reconstruction works were being carried on since this use of the premises was to their benefit as lessees and thus amounted to rateable occupation.

31. It was only in the context of an argument that a nil valuation should have been put on the rateable premises that Henchy J. considered the argument in respect of the hypothetical tenant, holding that since the reconstruction works were but an episode in the continuous beneficial use of the premises as a shop, the Commissioner was entitled to value it as a shop and to consider changes in the letting value to the hypothetical tenant after the works would be completed. Similarly, in *Iarnroid Éireann v. The Commissioner of Valuation*, (Unreported, High Court, 27th November 1992) Barron J. addressed the question of the hypothetical tenant exclusively in the context of the valuation to be placed upon the hereditament, being the rent which a hypothetical tenant would be prepared to pay for the premises.

32. Turning to the UK case law, in the case of *Tomlinson v. Plymouth Argyle Football Company Limited 6 RRC 173*, relied upon on by counsel for the Commissioner, the extensive discussion as to the identity of the hypothetical tenant was again in the context of the level at which the rent was assessed rather than the existence of rateable

occupation. Similarly, in *Mayor v. White* [1900], Law Times 408 Vol LXXXIII, the question was whether the premises were incapable of rateable occupation where a shop owner occupied his shop in summer only and removed his stock for the winter while leaving in place fixtures and other articles. The Court considered whether there was an occupation during the winter months, and, given that all that was necessary to carry on the business was kept on the premises (with the exception of the stock itself), concluded he was in occupation for the winter months. No reference was made in that context to the question of a hypothetical tenant.

33. However, in the case of *West Bromwich School Board v. West Bromwich Overseers* [1884] 13 QBD 929 the Court looked at the question of a hypothetical tenant in the context of whether the property was rateable at all. There, a school board owned, *inter alia*, a school house that was not capable of being beneficially occupied by the school board because of statutory restrictions. Brett M.R. looked at whether the school board could obtain a hypothetical tenant and having concluded that it could, considered that the land was rateable (page 942). Bohan L.J. agreed, observing that it is necessary to consider whether the property was capable of being beneficially occupied in the hands of any other person. He observed that:

> *"If land is by law struck with sterility when in any and everybody's hands so that no profit can be derived from the occupation of it, it cannot be rated to the relief of the poor. If the schoolhouse is not used by this school board for any profitable purpose, it by no means follows that the site of it must sterile in every other person's hands."*

That dicta is clearly in the context of whether or not beneficial occupation could be established at all rather than in the valuation context.

34. That decision was followed in *London County Council v. Erith Churchwardens* [1893] AC 562 by the House of Lords. Referring to the dicta of Bohan L.J. identified above, Herschell L.C. observed that if land is struck with sterility in any and everybody's hands:

> *"… whether by law or by its inherent condition, so that its occupation is and would be of no veins to anyone, I should quite agree that it cannot be rated to the relief of the poor. But I must demur to the view that the question whether profit (by which I understand is meant pecuniary profit) can be derived from the occupation by the occupier is a criterion which determines whether the premises are rateable and at what amount they should be assessed; and I do not think that a building in the hands of a school board is incapable of being beneficially occupied by them and is not so occupied because they are prohibited from deriving pecuniary profit from its use".*

35. Accordingly, there appears to me to be a conflict between the clear wording of the Act, which indicates one only looks at potential rateable occupation by the owner, and a well-established line of U.K. case law indicating that, when considering if a property is capable

of being the subject of rateable occupation (and specifically beneficial occupation in that context) one may look beyond the owner to a hypothetical tenant.

36. However, given that the Tribunal proceeded on the basis that it was appropriate to look at a hypothetical tenant and no objection was taken by counsel for Fibonacci to that course, either at the Tribunal or before the High Court, I will proceed on the basis that there is an obligation on the Valuation Tribunal to look at the question of a hypothetical tenant, in other words to treat Schedule 3, s. 2(b) as requiring the Tribunal to look not only whether a property is capable of being the subject of rateable occupation by the owner but also alternatively by hypothetical tenants.

Treatment of hypothetical tenants by the Tribunal

37. The complaints by Mr. Connelly SC, Counsel for the Commissioner, in respect of the Tribunal's treatment of the hypothetical tenant are related to (a) the Tribunal's alleged failure to look at AIB as a hypothetical tenant; and (b) the Tribunal's alleged failure to consider the position from the viewpoint of a tenant who would be taking a long lease, over 10 or 20 or 25 years. I assess these two complaints under separate headings below.

(i) Alleged failure of Tribunal to consider AIB as a hypothetical tenant

38. To evaluate the Commissioner's claim that AIB ought to have been specifically identified as a hypothetical tenant and specifically addressed given its different situation, it is necessary to recall the nature of the obligation to consider hypothetical tenants. The case law suggests that there is an obligation to consider whether the property *"is capable of being beneficially occupied in the hands of any other person" or whether, alternatively, the "land is by law struck with sterility when in any and every body's hands, so that no profit can be derived from the occupation of it"*.

39. The Valuation Tribunal undoubtedly considered the question of whether the Property was capable of being beneficially occupied in the hands of any other person. But the Commissioner asserts that that the position of AIB should have been specifically considered by the Tribunal since it was a possible hypothetical tenant which would be able to circumvent the otherwise deterrent factors raised by the Appellant in respect of the relevant property (see page 9 of the Commissioner's Written Legal Submissions). To evaluate this argument, it is necessary to consider the evidence before the Tribunal, including that specifically relevant to AIB.

40. In my view, the relevant evidence is as follows: (a) AIB had terminated its lease in 2014, had vacated the Property, and had cut off all services when it did so; (b) AIB had refused to reconnect the services to the Property when requested to do so; (c) Fibonacci had provided evidence to the Tribunal of the cost and time required if services were to be reconnected to the Property by a hypothetical tenant; (d) that evidence included the costs, time and planning implications if AIB sought to reconnect to the electricity network as AIB would probably require permission from ESB to reconnect to the network and there would likely be a necessity for construction of a sub-station involving an application for

planning permission for same. Mr. McNulty gave evidence in this regard, including in respect of the time and cost involved in such a construction.

41. On the other hand, Mr. O'Brien for the Commissioner confirmed that his estimation of the cost of the works a hypothetical tenant would have to undergo did not include a costing of the works based on AIB renewing their tenancy of the Property. The Commissioner tendered no evidence at all in respect of the re-connection of the Property, either by AIB or any other hypothetical tenant. Rather, the approach of the Commission at the hearing was to say that, as a matter of principle, the actual state of the premises is to be ignored. Mr. O'Brien' evidence was unambiguous in this respect. when estimating the rent payable for the purposes of calculating the net annual value.

The Tribunal records that counsel for the Commissioner submitted that AIB must be considered a possible hypothetical tenant in which case there would not be any obstacle to connecting to the existing AIB services and that accordingly the significant reconnection costs would not be incurred (paragraph 9.5 of the Judgment). However, no evidence of any sort was provided to the Tribunal in that respect, either in relation to AIB wishing to re-occupy the Property, or the lack of obstacles to connection or the impact of same on the reconnection costs identified by Fibonacci. In the event, therefore, no evidence was given by either party as to any intention on the part of AIB to seek to re-occupy the Property they had vacated.

42. In the circumstances, the Tribunal evaluated the likelihood of a hypothetical tenant occupying the Property at the rent identified in the Valuation Certificate and held that no hypothetical tenant would be willing to do so.

43. I am satisfied that the Tribunal were entitled to make their decision on the uncontroverted evidence before them in that respect. They were not obliged to address the situation of AIB and consider their situation separately to any other hypothetical tenant in circumstances where they had scant evidence before them identifying the differential factual position that would pertain if AIB were to be treated as the hypothetical tenant.

44. Before the Tribunal, Fibonacci bore the burden of proof as the Appellant; but where it had put before the Tribunal evidence as to why a hypothetical tenant would not occupy the Property at the rent identified in the Valuation Certificate, and where the Commissioner sought to controvert that evidence by invoking the position of a particular hypothetical tenant in a different situation who would, on its case, occupy the Property at the rent identified because of its own particular circumstances, then it was incumbent upon the Commissioner to provide evidence in that respect. The Commissioner signally failed to present any evidence at all in this respect.

45. In the circumstances, I find that neither the case law on the consideration of hypothetical tenants nor any other legal principle required the Tribunal to specifically address the position of AIB as a hypothetical tenant as distinct from any other hypothetical tenant.

(ii) Alleged failure by the Tribunal to correctly consider the length of the letting to be taken by hypothetical tenant

46. The second argument made by the Commissioner is that the Tribunal erred in not considering that a hypothetical tenant would have been expected to occupy the premises over a relatively lengthy period possible up to ten or twenty years so that the costs of refurbishment or reconnection works would not have operated as a complete deterrent or bar to the beneficial occupation of the Property by such a hypothetical tenant (see page 6 of the Commissioner's written legal submissions).

47. No law has been identified by the Commissioner that indicates that there is an obligation on the Tribunal to look at the question of occupation over 10 or 20 years in deciding whether a hypothetical tenant is likely to take occupation of the Property. Indeed, it appears to me to be contrary to the principle that premises should be valued in their actual state or "*rebus sic stantibus*".

48. Equally, s.48(3) of the Act requires a valuation of relevant property to be done on the basis of the actual state of the property. Section 48(3), when defining net annual value, defines it as the rent for which, one year with another, are borne by the tenant.

49. In *R. v. South Staffordshire Water Works Company* [1885] 16 QBD 359, the duration of the hypothetical tenant was described as follows:

> *"A tenant from year to year is not a tenant for one, two, three or four years but he is to be considered as a tenant capable of enjoying the Property for an indefinite time, having a tenancy which it is expected will continue for more than a year but which is liable to be put to an end by notice".*

50. In *Consett Iron Company Limited v. Assessment Committee for Durham* [1931] A.C. 396, Warrington L. quoted from the previous case of the *Great Eastern Railway Company v. Haughley Overseers* (1866) L.R. 1 Q.B. 666 where it was stated that:

> *"It does not follow that because during the first year of the tenancy there is very little prospect of any profit that it is not worth the while of the proposing tenant to say to himself 'though my landlord at the end of six months may give me six months' notice, he is very unlikely to do so and if he does not do so I would have the right to occupy for eighteen months and though at the end of the eighteen months from the beginning of the tenancy he may still give me six months' notice, judging by the probabilities in the way business is conducted in matters of this sort, at any rate judging by the probabilities I do not think he will give me six months' notice then he will let me go on a little longer."*

51. Accordingly, a yearly tenancy is of indefinite duration but liable to be determined at any time upon one party giving one half year's notice to the other. In those circumstances, the argument of the Commissioner that the Tribunal erred in failing to value the Property on the basis of a hypothetical tenant that would have been willing to take a long view of

10 or 20 years on the basis that the expenditure and time required to go into occupation would be recouped, is difficult to understand. Such a hypothetical tenant would know that the tenancy could be terminated at six months' notice and for that reason would be very unlikely indeed to commence paying rent where it knew it would not be able to go into occupancy until the elapse of 18 months from the date of commencement of the lease. The summary of Mr. O'Brien's evidence identified in the Judgment at paragraph 10.8 demonstrates that he assumed that the tenant would be entitled to a fixed term tenancy. However, no legal basis for this assumption has been identified by the Commissioner.

52. Further, even if that were not the case, it is difficult to see why such a tenant would pay precisely the same market rent for a property that the tenant would have to wait 18 months to occupy and have to pay the sum of €12m in order to ensure the services were connected as it would for a property ready to be immediately occupied with all services available. Mr. O'Brien did not attempt to engage with the question as to why a tenant would pay the same rent for a property with the attendant disadvantages of the Property as it would for an equivalent property with no such disadvantages.

53. The legal obligation on the Tribunal is to consider whether the Property is capable of being beneficially occupied in the hands of any other person. The Tribunal's conclusion that it was not is a finding of fact based on evidence presented to it. There is no basis for me to conclude that these findings were incapable of being supported by the evidence. The criticism of those conclusions by the Commissioner is based on the approach of Mr. O'Brien which (a) ignores the case law on the duration of a tenancy when estimating net annual value and (b) ignores the disadvantages associated with the Property.

54. Accordingly, in the circumstances set out above, I have no hesitation in finding that the Tribunal did not err in failing to adopt the approach espoused by Mr. O'Brien.

(iii) Whether the Tribunal erred in considering only the rent identified in the Valuation Certificate

55. The Commissioner has made an additional argument that the Tribunal ought not to have considered solely whether the Property could be let at the rent of €1.8m being the net annual value but should have considered whether it could be let at any other rent and for any use, even a slight use such as storage.

56. In my view the Commissioner is incorrect on this point. The final valuation certificate specifying a valuation of €1,871,000 was issued on the 23rd of August 2017 by the Commissioner. That valuation was arrived at on the assumption that the Property was in a good state of repair. Under s.34 of the Act (as amended by the Valuation (Amendment) Act 2015, an appeal may be brought against a determination, *inter alia* under Section 28 of the value. The appeal in question was made against the determination of valuation of €1,871,000.

57. During the appeal process before the Tribunal, no other alternative valuation was put forward by the Commissioner at any stage. The Commissioner stood over the valuation on the basis that it was what comparable properties were valued at, and that it was to be

assumed that all properties are maintained in reasonable condition and state of repair and that services would be readily available at the relevant valuation date (paragraph 6.6 of the Judgment).

58. The Tribunal was provided with no evidence by the Commission that could have formed the basis for a finding that a hypothetical tenant would have taken the Property at a lower rent than that identified by the Valuation Certificate having regard to its existing condition. The Commissioner could have contended for a lower rent that would have taken account of the substantial anticipated time and cost of the repairs and provided an evidential basis for same but rather took the opposite course in valuing the Property as if it had no drawbacks.

59. In those circumstances, in my view, there was no obligation on the Tribunal to seek to obtain evidence in respect of some other valuation in circumstances where the Commissioner had not put forward any evidence in this regard.

60. Nor was there any obligation on the Tribunal to formulate an alternative hypothesis in respect of the rent that the Property could theoretically command for an alternative use in the absence of any evidence to that effect. The Tribunal was entitled to determine the appeal on whether the Commissioner was correct in law in issuing a valuation certificate in the sum of €1,871,000 and I can find no legal basis to impose an obligation on the Tribunal to consider the legality of a valuation certificate at some alternative unspecified level not identified in the valuation certificate. Accordingly, I do not find any error of law in the Tribunal's approach in this respect.

Whether the Tribunal erred in holding the Property should be valued in its actual state having regard to Section 48(3)

61. I find no error in the Tribunal's interpretation of s.48(3). The wording of s.48(3) provides that net annual value means, in relation to 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. The section then goes on to identify certain assumptions that might be made in this regard. But what is entirely clear is that one looks at the *actual state* of the property. In those circumstances it is difficult to see any flaw in the Tribunal's reasoning at para. 10.7 of its Judgment whereby it held that there was no justification of s.48 for an assumption the Property is in reasonable condition and state of repair prior to the hypothetical letting. The Tribunal stated:

> *"The express statutory assumption as to the nature of the hypothetical tenancy is that the Property is to be valued in its actual state as opposed to an assumed state of reasonable condition and repair".*

62. Despite the clarity of the statutory language, the Commissioner argues that the term "actual state" must be widely interpreted and one must look at the actual state of a property with all its potentialities and disabilities and consideration must be given to the past, present and future of the property. This argument derives largely (if not exclusively) from certain dicta from the decision of *Harper Stores Limited v. The Commissioner of Valuation* [1968] IR 166. (Other cases such as *Sinnott v. Neale, West*

Bromwich and O'Malley were identified in the written legal submissions of the Commissioner to support this interpretative approach but in my view those cases were concerned with the question of beneficial occupation and were not of any assistance in this respect).

63. The Commissioner's argument is somewhat curious in that it seems to contend that one must look at what a property could be if – in this case – significant time and money were expended upon it without looking at the impact such expenditure would have upon a tenant. But even leaving aside this, on the Commissioner's own case, following *Harper*, the "present" must be looked at it, as must the "disabilities" associated with the property. The Commissioner signally failed to look at either when valuing the Property, instead treating it as it would be in the future after its disabilities had been remediated.

64. Indeed, the High Court in *Harper Stores* quoted the case of *Great Western and Metropolitan Company v. Kensington Assessment Committee [1916] 1 A.C. 23* where that Court referred to dicta that provided as follows:

> *"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, speculation as to what the value of a house might be under conditions from those subsisting".*

65. Those words seemed particularly apt here since what the Commissioner is contending for is a value based on a speculation as to what the value would be if very significant works were carried out.

66. Henchy J. noted at p.174 that the appellant's argument was that since the Commissioner was bound to value the premises before the 1st of March in its actual state he could not take into account its condition when the reconstruction would be completed after the 1st of March. He did not accept this as a correct statement of the limitation of the Commissioner's functions and observed:

> *"He must of course make the valuation on the premises in their actual state but since actual state denotes 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".*

67. Viewed in its proper context, the past, present and future analysis is one that may be appropriate in a given situation but is not in any way mandatory. In *Harper Stores* it was necessary to look at the future since it was known as a matter of certainty that in ten weeks the shop would be finished with the refurbishing project and that was a relevant factor to take into account in assessing the net present value. On the other hand, it is equally clear that it was Henchy J.'s view that it was necessary to look at the premises as it stood *with all its potentialities and disabilities*. That part of the sentence seems to me to be fatal to the Commissioner's claim that it is permissible to simply ignore the state of the Property when examined and valued. What the Commissioner is contending for in

truth is a valuation based exclusively on a hypothetical future i.e. that the works had been successfully carried out and completed. This approach is entirely contrary both to the principles expressed in the decision of *Harper* and to the express wording of s.48(3). There was no factual circumstance that required the Tribunal, unlike in the case of *Harper*, to look at what the condition of the Property might be in the future since there were no plans or commitments to carry out the necessary works to make it habitable.

68. Further, applying the *Harper* test that one must look at the intention and the degree or quality of use, no argument can be made that any reconnection works were simply an episode in the continuous beneficial use of the premises as an office block, given that there was never any intention, continuous or otherwise, on the part of the owners of the Property to use same as an office block and no user of it as an office block.

69. For all these reasons, *Harper Stores does* not justify the Commissioner's approach of treating the Property as if it were ready for occupation. Even at the height of the Commissioner's argument, looking at the actual state of the Property with all its potentialities and disabilities with consideration being given to the past, present and future, one could not arrive at the end point that the Property is in a comparable state to equivalent properties.

70. In all the circumstances this ground is not well founded.

Whether the Tribunal erred in law in determining that only the carpark ought to be included in the valuation list of the rating authority of Dublin City Council

71. It is submitted by the Commissioner that the severance of the carpark is not appropriate because blocks A, B, C and D of the relevant are capable of beneficial occupation by the appellant. For the reasons that I have set out above, I do not agree with that contention and therefore it seems to me that this question falls away.

Answers to the questions of law stated to the High Court

72. For the reasons set out in this judgment:

(1) The Tribunal did not err in law in determining that the properties the subject matter of the appeal are not capable of beneficial occupation within the meaning of the Valuation Act.

(2) The Tribunal did not err in law in determining that the carpark ought to be included in the valuation list of the rating authority of Dublin City Council in determining the valuation to be €162,500 and in amending the description of the remainder of the Property to be entered on the valuation list to carpark.

(3) The Tribunal did not err in law in its view that under s.48 of the Act it should not be assumed that the Property is in a reasonable condition and state of repair and that the express statutory assumption as to the nature of the hypothetical tenancy is that the Property is to be valued in its actual state as opposed to an assumed state of reasonable condition and repair.

(4) The Tribunal did not err in law in determining that it would;

(a) cost approximately €12m to reconnect the Property to services in order to command a rent of €1.871m per annum;

(b) in accepting the appellant's argument that no hypothetical tenant would take a letting of the Property at that rent in circumstances where it would have to expend a sum of €12 million on reconnection works that would take 18 months to complete; and

(c) in holding that the absence of consent to use any pipes, drains, conduits, services, utility systems or services of any kind in or under the Property have so adversely affected the Property that it was rendered incapable of beneficial occupation.

In the circumstances I affirm the determination of the Tribunal of 7th November 2018 in respect of which the case has been stated.