THE HIGH COURT

[2017 No. 617 S.S.]

IN THE MATTER OF SECTION 39 OF THE VALUATION ACT, 2001

AND IN THE MATTER OF THE VALUATION OF PROPERTY NUMBER 78065, CAR PARK AT 47-53 CLARENDON STREET, COUNTY BOROUGH OF DUBLIN

(APPEAL NUMBER VA14/5/387)

BETWEEN

STANBERRY INVESTMENTS LIMITED

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

JUDGMENT of Ms. Justice O'Regan delivered on the 8th day of November 2018

Issues

1. This is an appeal by way of case stated of the 2nd June 2007 pursuant to s. 39 of the Valuation Act, 2001 against the judgment of the Valuation Tribunal bearing date 1st April 2016. The case is stated by the Valuation Tribunal at the request of the within appellant. It refers to the car park mentioned in the title hereof colloquially known as the Brown Thomas car park. The appeal to this court, under s. 39 aforesaid, is limited to a point of law. Under section 39 (5) the High Court may reverse, affirm, amend or remit the matter to the Tribunal.

Decision of the 1st April 2016

2. The matter under consideration by the Tribunal was an effective revaluation of the subject premises as part of the revaluation of Dublin City Council rateable valuation area ascertained as of the 7th April 2011. The purpose of the revaluation was to determine the Net Annual Value (NAV) of the relevant property as defined in s. 48 (3) of the 2001 Act.

3. By way of background to the impugned decision an initial valuation is ascertained by a valuation manager which may then be agreed or appealed to the Commissioner of Valuation. This is what occurred in the instant matter and on the 12th August 2014 the Commissioner of Valuation agreed with the valuation manager's valuation of €1,140,000. As permitted by the legislation the appellant herein issued a notice of appeal of the 3rd September 2014 as against the Commissioner of Valuation decision, to the Valuation Tribunal. This appeal was by way of oral hearing over a two-day period commencing on the 15th December 2015 where expert evidence on behalf of both the appellant and the Commissioner of Valuation was given. Arising from this hearing the decision of the 1st April 2016 issued. In its decision, the Tribunal reduced the applicable rate by €250 per car parking space to €2,750 per space which amounted to a valuation of €1,045,000.

4. The amended case stated of the 5th October 2018 identified five questions arising out of the impugned decision namely: -

> 1. If the appellant is correct that the determination was based on an error of fact, did the Tribunal fail to comply with s. 48 (1) of the 2001 Act or arrive at the determination which was vitiated by significant errors of fact and thereby erred in law in doing so?
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> 2. Did the Tribunal err at law in identifying the Setanta car park and Trinity Street car park as establishing the emerging tone of the list in circumstances where the valuation in respect of each of such car parks was under appeal?
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> 3. Did the Tribunal err in law in accepting comparisons close to the subject premises particularly Setanta and Trinity, which were part of the schematic of the respondent notwithstanding the Tribunal found that such schematic was of limited benefit?
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> 4. Did the Tribunal err in law in failing to accord any or any due regard to the market and emerging tone of the list reflected by the un-appealed or agreed valuations of the North City car parks?
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> 5. Did the Tribunal err at law in using the comparison method as opposed to any other method in circumstances where the Setanta and Trinity car parks being situate on the south side were under appeal?

5. The impugned judgment herein comprises a thirteen page document. The Tribunal itself consisted of a three party Tribunal. It is common case that the Tribunal might be considered within the concept of an expert Tribunal (See H*enry Denny & Sons (Ireland) Ltd. v. Minister for Agriculture* [1998] 1 IR 34). At Para. 2 of the judgment the Tribunal determined the NAV of the subject premises as being €1,045,000 thereafter set out the reasons for achieving this reduced figure. Such reasoning consisted of setting out details of the appellant's case and the evidence at cross examination of the appellant's witness. The respondent's evidence, including comparisons, together with the cross examination of the respondent was then set out. At p. 11 reference is made to further information which came to hand after the hearing. Thereafter the decision incorporates a summary of the arguments made by the respective parties including the appellant's submission that the appellant's best comparison was Arnott's and Drury Street in respect of rental. At p. 12 of the judgment there is a section headed "Conclusion" and on p. 13 of the judgment the section is headed "Findings".

6. In the conclusion section the Tribunal found the instant car park to be a busy city centre car park with pedestrian access to Brown Thomas and easy access to Grafton Street and adjoining streets. It is noted that no other car park referred to has the dual restriction applicable to the instant property namely no contract parking is permitted and increased charges must be made in respect of long term parking, by virtue of the planning permission. The Tribunal noted the appellant's complaint in respect of disruptive work however found the respondent's comments that same were reflected and included in the various comparisons as persuasive.

7. The Tribunal noted the appellant's difficulty with the differentiation between north side and south side by the Commissioner arriving at a schematic and thereafter indicated that the respondent's argument that this is the third best car park in the city with the two

other car parks also being on the south side as being relevant.

8. The Tribunal found little weight could be placed on Drury Street in the circumstances and was persuaded by the respondent's arguments relative to opening hours between north and south inner city (longer opening hours were available to the instant car park than for example Arnott's car park). The respondent indicated that there were congestion issues by the operating of Stephen's Green and the RCSI car parks being run in tandem. The Tribunal was satisfied that weight could be placed on the rent agreed between the parties in respect of the Setanta car park (although it is clear from the recorded evidence of the appellant that the appellant was arguing that no such weight should be placed on this rental). In the final paragraph under the heading conclusion the following is stated:-

> *"The presence of contract parking in the various comparisons including Arnott's together with their proximity to retail destinations will make their application to the subject difficult."*

9. In the finding section the Tribunal found that the schematic of the Commissioner was of limited benefit in failing to make sufficient adjustments for planning restrictions and applying a divide between north and south side that makes comparison between the two difficult. Thereafter the findings section incorporates:-

> *"However the Tribunal is persuaded by the market and emerging tone of the list comparisons, close to the subject, particularly Setanta car park and Trinity street car park subject to adjustment."*

Relevant jurisprudence

10. Generally speaking, there is a large amount of agreement between the parties as to the applicable jurisprudence in respect of the issues raised in the instant matter – at Para. 76 of the respondent's submissions it was stated that the respondent relied upon the comments of the courts in *Nangles Nurseries v. Commissioner of Valuation* [2008] IEHC 73, *Commissioner of Valuation v. Carlton Hotel Dublin Airport* and *Premier Periclase Limited v. Commissioner of Valuation*; decisions as cited by the appellant. In addition, the respondent refers to a separate portion of the judgment of O'Malley J. in *Carlton* and also refers to the judgment of Costello J. in *Proes v. Revenue Commissioners* [1998] 4 I.R. 174. Further, the respondent cautions that it is important to bear in mind that this is an appeal on a point of law as opposed to a judicial review application and therefore although similar to judicial review the position on the law is not identical.

11. In *Proes v. Revenue* Costello J. set forth four principles applicable to a case stated as follows. The High Court, when considering a case stated as to whether a particular option was correct in law, should apply the following principles:

> *"(i) findings of primary fact by the trial judge should not be disturbed unless there is no evidence to support them,*
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> *(ii) inferences from primary facts are mixed questions of fact and law,*
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> *(iii) if the trial judge adopted a wrong view of the law, his conclusions should be set aside,*
>
> *(iv) if the trial judge's conclusions are not based on a mistaken view of the law, they should only be set aside if he drew inferences which no reasonable judge could draw.*

12. In *Commissioner of Valuation v. Carlton Hotel Dublin Airport Ltd* [2013] IEHC 170 O'Malley J., in the High Court, adopted the analysis of the Tribunal in *Marks and Spencer v. Commissioner of Valuation* (9th April, 2009, VA08/5/125) relative to the assessment of the determination of the NAV and the relevance of comparisons when the Tribunal stated:-

> *"On the day a new valuation list is published a preliminary 'tone of the list' is originated, but little weight, if any, can, for comparison purposes, be attached to any of the assessments contained therein as they are as yet unchallenged. After the 40 day appeal period, as provided for under s. 30, the situation changes somewhat, in that there is then in the list a substantial number of entries whose assessments have been accepted (or perhaps in some instances agreed at the representation stage under s. 29) or otherwise unchallenged.*
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> *At the time of an appeal to the Tribunal under s. 34 the situation will have moved on significantly, in that by far the greater percentage of entries in the list would have been accepted, agreed or determined at the s. 30 appeal stage and hence be representative of an as yet emerging tone of the list."*

13. Furthermore, O'Malley J., at Para. 62 of her judgment, highlighted the fact that different methodologies can give significantly different results.

14. In *Premier Periclase Ltd v. Commissioner of Valuation* (Unreported, Kelly J., 24th February 1999) the court was dealing with a case stated from the Valuation Tribunal and at p. 25 of his judgment Kelly J. dealt with the development of the concept of the principle of curial deference which was explained by Hamilton C.J. in *Henry Denning & Sons Ireland Ltd v. Minister for Social Welfare* [1998] 1 I.R. 34. Hamilton C.J. set forth the approach which the court should take when asked to interfere with the decision of an expert administrative tribunal. He said:-

> *"They should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by a tribunal such conclusions must be corrected. Otherwise it should be recognised that tribunals which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgments on the evidence and arguments heard by them, it should not be necessary for the courts to review their decisions by way of appeal or judicial review."*

15. In the same case Keane J. stated that findings of fact made by the appeals officer could not be disturbed unless they were incapable of being supported by the facts or were based on an erroneous view of the law.

16. Kelly J. was satisfied that the Valuation Tribunal was the type of expert body referred to by Hamilton C.J.

17. In *E. v. Secretary of State for the Home Department* [2004] QB 1044 the Court of Appeal set out four ordinary requirements that would have to be met before a mistake of fact would give rise to the necessary unfairness so as to amount to an error of law (this case arises in the context of a judicial review) as follows:-

1. There must have been a mistake as to an existing fact. The fact must have existed before or at the time of the decision.

2. The fact or the existence of the evidence must have been "established", in the sense that it is uncontentious and objectively verifiable.

3. Neither the individual seeking to rely upon the mistake nor his advisers must have been responsible for the mistake.

4. The mistake must have played a material (but not necessarily decisive) part in the public body's reasoning.

18. In *Mulholland v. An Bord Pleanala* [2005] IEHC 306 Kelly J. cautioned against the court allowing material gaps to be filled by affidavit evidence or otherwise (this case is a judicial review matter and is cited by the appellant in the context of any explanations now afforded on behalf of the respondent by Counsel as to the mistakes contained within the decision of the Tribunal).

19. In *P. & F. Sharpe Ltd v. Dublin City and County Manager* [1989] I.R. 701 Finlay C.J. in the context of a judicial review application indicated that it was the function of a planning authority to exercise its decision to grant or withhold permission in a judicial matter:-

> *"The practical consequences of that are that the decision-making authority must have regard to all relevant and legitimate factors which are before it and must disregard any irrelevant or illegitimate factor which might be advanced."*

(See De Blacam, *Judicial Review*, 2nd ed. (2017) at Para. 9.25 and see *The State (Hennessy) v. Commons* [1976] I.R. 238).

20. In *State (Keegan) v. Stardust Victims Compensation Tribunal* [1986] I.R. 642 Henchy J. addressed the test of unreasonableness or irrationality in the context of judicial review; stated that the impugned decision must plainly and unambiguously fly in the face of fundamental reason and common sense to be so categorised.

The parties' respective positions
21. Bearing in mind the questions raised in the case stated and the jurisprudence relied upon by the parties the most significant of which are hereinbefore set forth the parties' respective submissions might be summarised as follows:-

Appellant's submissions

1. The errors of fact with regard to Arnotts in particular go to the heart of the decision of the Tribunal.

2. Insofar as the error of fact relevant to who in fact appealed the Trinity Street car park determination the appellant suggests that this was significant because in rating circles an occupier's appeal is favoured over that of a third party. The error in respect of the Arnott's street car park is all the more significant because the appellant is clearly prejudiced; he having identified this car park as his best comparator and by excluding same the Tribunal excluded favourable comparison from the appellant's point of view.

3. The error with regard to contract parking at Arnott's fed into the decision of the Tribunal and therefore contaminated same.

4. In respect of the error relevant to the Dawson Street car park the appellant acknowledges that whereas such an error might be somewhat insignificant nevertheless it demonstrates, coupled with the other errors identified, that the decision is in fact error prone and therefore unreliable.

5. Trinity and Setanta did not in fact identify the emerging tone of the list as of the date of the determination the position with regard to these car parks was not accepted, agreed or determined (see *Carlton*) and therefore there was an error of law in categorising these car parks as providing evidence of "the emerging tone of the list" and therefore considering same was an irrelevant consideration.

6. It is irrational of the Tribunal to indicate that the respondent's schematic is of limited value but then to go on to rely on same by including Setanta and Trinity. The Tribunal was acting in an inconsistent manner in this regard.

7. It was irrational for the Tribunal to exclude from consideration the north side car parks.

8. The comparison method of assessment of the NAV is an incorrect approach given that comparisons were under appeal and the Tribunal found the respondent's schematic to be difficult. The Tribunal should have proceeded on the basis of profit or construction assessment as provided for by s. 50 of the 2001 Act.

9. It is not inconsistent for the appellant to rely on Arnott's street notwithstanding that same was under appeal at the time and to seek to exclude Trinity and Setanta also under appeal as it was clear that the Arnott's street assessment could only proceed on a downward trajectory, therefore the appellant's reliance on Arnotts was at a time when the NAV was assessed at its highest possible figure.

10. Accuracy is expected by expert Tribunals.

11. The appellant is not limited by any arguments in prior appeals during the currency of the within NAV assessment.

12. There is no reasoning provided by the respondent's expert relative to the schematic produced.

13. All comparisons are subject to adjustment as a twin comparison does not exist.

Respondent's submissions

1. The asserted error relative to Dawson Street is of no consequence and amounts to a misrecital rather than a finding of fact.

2. The statement contained at the last paragraph of p. 12 of the decision should be read so that it provides that effectively not only is the presence of contract parking at Arnott's making it a difficult comparator but also the fact that it is approximate to retail destinations in and of itself would make it a difficult comparator.

3. The appellant has overstated the impact on the decision of the errors.

4. Reference to "subject to adjustment" in the second paragraph of the findings portion of the decision identifies that the Tribunal was aware that both Setanta and Trinity were under appeal and therefore was taking this into account.

5. Reference to "emerging" tone of the list comparisons in the second paragraph of the findings section of the decision demonstrated that because Setanta and Trinity were under appeal the Tribunal recognised that tone of the list had not yet been arrived at.

6. If the reasoning for the schematic gave rise to difficulty, then this matter should have been an issue in the appeal to the Tribunal and in any event the schematic was fully explained having regard to the entirety of the documents presented by the respondent's expert.

7. The appellant makes an inconsistent argument by seeking to exclude Setanta and Trinity but relying on Arnotts where all three units were in fact under appeal.

8. The judgment of O'Malley J. in *Carlton* suggests that Setanta and Trinity were of limited value as opposed to of no value.

9. The concept of irrationality requires a very high standard in particular when dealing with expert Tribunals and the need for curial deference.

10. The decision of the U.K. Court of Appeal in *E*. aforesaid should not be followed as it arises in a judicial review and is not a judgment of the courts of this jurisdiction.

11. Insofar as methodology is concerned the requirement of uniformity and equity is critical.

12. Arnotts is outside the immediate environs of the appellant property and clearly car parks within the immediate environs are more relevant from a comparison point of view.

13. The appellant has the burden of proof in the within appeal before the court.

14. Arnotts was not referred to as the best comparator in prior appeals.

15. It is not the case that the north side properties were in fact excluded as such.

16. The acceptance of comparisons before the Tribunal is a matter within its discretion.

17. The submission relevant to methodology on behalf of the appellant is insufficiently developed to warrant a successful outcome from the appellant's point of view.

Decision

22. I agree with the appellant's argument that the respondent is attempting to redefine the concept of emerging tone of the list with regard to the second paragraph of the findings section of the decision. The concept of the emerging tone of the list does involve, in my view, review of matters that have been accepted, agreed or determined as opposed to including those properties which remain under appeal (see *Carlton*).

23. I am not satisfied that by incorporating "subject to adjustment" in the second paragraph of the findings section the Tribunal was expressing its understanding that the Setanta and Trinity car parks might be reduced on appeal. Even if the respondent's contention in this regard is correct it seems to me that therefore the Tribunal is making a guesstimate as to the outcome of the appeal (if the Tribunal is incorporating an adjustment relative to such appeals), which is neither valid nor appropriate.

24. The argument presented by the respondent as to the understanding of the last paragraph of the conclusions section is certainly one means of reading the sentence. However, an equally valid understanding of the sentence would be that the combination of the presence of contract parking and its proximity to retail destinations, combined, made Arnotts a difficult comparator. In these circumstances I am not satisfied that reference to the presence of contract parking at Arnotts can be ring-fenced and excluded so that it might be said that it is clear that the Tribunal would have excluded Arnotts on the sole basis of its proximity to retail destinations (see the first sentence of Para. 6 hereof).

25. I am satisfied that the error relevant to the existence of contract parking in Arnotts was contained within the decision of the Tribunal on the basis that the conclusions section fed into the findings section and in any event both sections combined comprised the sections within the decision that affords insight into the Tribunal's decision making – the balance of the decision of the Tribunal being dedicated to detailing the position of the respective parties before the Tribunal. In these circumstances I am satisfied that the error relevant to Arnotts was within the decision of the Tribunal, certainly within the "conclusions", as it appearing in the conclusion section and therefore in the words of Hamilton C.J. in *Henry Denning* was an unsustainable finding of fact by the Tribunal within the conclusion portion of the decision.

26. I am satisfied that the schematic on the part of the respondent has been fully reasoned in regard to the totality of the documents furnished. However, in the alternative, even if this is not correct I agree with the respondent that the issue should have been raised in the appellant's appeal to the Tribunal.

27. The appellant, in my view, was entitled to raise Arnotts as its best comparator in its appeal before the Tribunal notwithstanding that it may not have been identified as such in earlier appeals in the within process. No legal basis to preclude the appellant in this regard has been identified by the respondent.

28. *E. v. Secretary of State* is, in my view, of considerable assistance notwithstanding that it arises in the context of an understanding of the principles involved in judicial review and a reviewable error of law. The court sets out four ordinary requirements which it observes did not constitute a precise code and the four requirements identified do not run contrary to the Irish jurisprudence such as *Premier Periclase* or *Henry Denning*.

29. Clearly there is no identifiable basis to suggest that contract parking existed in the Arnott's car park.

30. I am not satisfied that the decision did in fact exclude north side car parks from consideration. In this regard in the findings section the Tribunal found the Commissioner's schematic to be of limited benefit and highlighted the fact that it applied a divide between north side and south side making comparisons between the two difficult – this suggests that the schematic was criticised because of making comparisons between the north side and south side difficult.

31. In my view there is no want of jurisdiction on the part of the Tribunal in looking at car parks close to the subject car park. However, by highlighting in particular Setanta and Trinity in the context of "emerging tone of the list" there was an error of law on the part of the Tribunal (*Carlton*). Such error is not saved, as aforesaid, by the inclusion of "subject to adjustment". I accept that Setanta and Trinity were of some assistance to the Tribunal in that the rents associated with these car parks were of considerable value however this does not overcome the fact that the Tribunal referred to these car parks as identifying an emerging tone of the list.

32. There is no evidence to suggest that the Tribunal excluded a market and emerging tone of the list (as reflected by accepted or determined valuations) of north city car parks. Even if it had, given the fact that it is an expert Tribunal it must be accorded curial deference and it appears to me that the Tribunal acted within jurisdiction in finding that comparators close to the subject premises are more persuasive than others, there being sufficient evidence before it in this regard to come to such a conclusion (see Para. 7 above).

33. I am not satisfied that there is evidence that a third party appeal would not be considered in the same light as a party appeal. Merely stating that such is the understanding in rating circles without evidence is insufficient to suggest that the error with regard to the identity of the party who appealed the determination in the Trinity Street car park went to the heart of the decision or otherwise clearly influenced the decision.

34. The Tribunal did not err in arriving at the relevant value of the premises by using the comparison method – such an approach would, appear to me, to be fair or equitable given the fact that an accepted, agreed or determined valuation of one particular property will thereafter have an impact on another. Furthermore, I accept the respondent's submission that this point has not been sufficiently developed by the appellant to warrant a successful outcome for the appellant.

35. I am not satisfied that the error with regard to Dawson Street was of any significance and I am further satisfied that the jurisprudence identified by the parties does not support the accumulation of a number of inconsequential errors as being sufficient to condemn a decision. The case law, in my view, refers to errors which comprise the basis of the conclusion.

36. I am satisfied that the error of the Tribunal with regard to Arnott's contract parking is all the more significant when one considers same in the context of the difficulty expressed by the Tribunal with regard to the Commissioner's schematic on the basis that it applies a divide between north side and south side making comparisons difficult – this suggests that north side car parks are not by definition excluded from consideration.

37. In the light of the foregoing I would answer the questions of law arising as follows:-

> 1. The determination of the Tribunal was based on an error of fact relevant to the Arnott's street car park and thereby erred in law in doing so.
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> 2. The Tribunal erred in law in having regard to or placing weight on the emerging tone of the list attributable to Setanta and Trinity Street car parks which were then under appeal.
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> 3. Notwithstanding the Tribunal's comments relevant to the Commissioner's schematic it was within jurisdiction of the Tribunal to accept comparisons close to the subject premises notwithstanding that Setanta and Trinity Street car parks were part of the Commissioner's schematic.
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> 4. The appellant has failed to establish that the Tribunal erred in law in failing to accord any or any due weight to the market and emerging tone of the list reflected by un-appealed or agreed revaluations of the north city car parks.
>
> 5. It was within the privilege and jurisdiction of the Tribunal to use the comparison method applied by it to its decision, no cogent argument to warrant a contrary outcome having been advanced.